IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 76-878

EDWARD W. MAHER, Commissioner of Social Services of the State of Connecticut
Appellant,

v.

DONNA DOE, ET AL
Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF CONNECTICUT

JURISDICTIONAL STATEMENT

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IN THE

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EDWARD W. MAHER, Commissioner of
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Appellant,

v.

DONNA DOE, ET AL
Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF CONNECTICUT

JURISDICTIONAL STATEMENT

Appellant appeals from the judgment of a three-judge United States District Court for the District of Connecticut, entered on June 17, 1976, permanently enjoining the Appellant from further enforcing Section 404.6, effective November 1, 1975, of Volume I, Chapter III, of the Connecticut Department of Social Services Public Assistance Program Manual, and submits this statement to show that the Supreme Court of the United States has jurisdiction and that a substantial question is presented.

OPINION BELOW

The opinion of the three-judge District Court which is the subject of this appeal is reported in 414 F.Supp. 1368. A copy of that opinion is attached hereto as Appendix A. Earlier opin-

ions in this same case are reported in *Doe* v. *Norton*, 356 F.Supp. 202 (D. Conn. 1973) (in which a single-judge District Court denied an application for a preliminary injunction); and in 365 F.Supp. 65 (D. Conn. 1973) (original opinion of three-judge court upholding the constitutionality of § 52-440b of the General Statutes of Connecticut). Probable jurisdiction noted, *Roe et al* v. *Norton, Commissioner of Welfare*, 415 U.S. 912 (1974), judgment vacated and remanded, 422 U.S. 391 (1975).

JURISDICTION

This suit was brought by the plaintiffs (appellees) under 42 U.S.C. § 1983 and jurisdiction was based on 28 U.S.C. § 1343(3). In the hearing on remand from the Supreme Court of the United States before a three-judge District Court, the plaintiffs continued to seek to enjoin, in addition to declaratory relief under 28 U.S.C. § 2201 et seq., the enforcement of a state statute and to restrain the appellant-state commissioner of social services from the enforcement, operation, and execution of a regulation of statewide applicability in the enforcement and execution of such state statute on the grounds of their unconstitutionality.

In the hearing on merits after the remand from the Supreme Court of the United States, the three-judge District Court entered judgment on June 17, 1976 (a copy attached hereto as Appendix B), and the notice of appeal was filed in that District Court on July 29, 1976 (a copy attached hereto as Appendix C).

The jurisdiction of the Supreme Court to review this decision by direct appeal is conferred by Title 28, United States Code, §§ 1253 and 2101(b). The following decisions sus-

tain the jurisdictions of the Supreme Court to review the judgment on direct appeal in this case:

King v. *Smith*, 392 U.S. 309, 312 (1968);
Moody v. *Flowers*, 387 U.S. 97, 101-102 (1967);
American Federation of Labor v. *Watson*, 327 U.S. 582, 592-593 (1946);
Wilentz v. *Sovereign Camp*, 306 U.S. 573, 579-580 (1939);
Okla. Gas Co. v. *Russell*, 261 U.S. 290, 292 (1923);
Alabama Comm'n. v. *Southern R. Co.*, 341 U.S. 341, 343-344 (1951);
Florida Lime Growers v. *Jacobsen*, 362 U.S. 73 (1960);
See: *Allen* v. *Grand Cent. Aircraft Co.*, 347 U.S. 535 (1954).

QUESTIONS PRESENTED

The questions presented by this appeal are:

I. Whether federal regulation, 45 C.F.R. § 303.5, is invalidated by § 402(a) of the Social Security Act, 42 U.S.C. § 602(a) (1976 Supp.), as amended by Pub. L. No. 93-647 (88 Stat. 2337) and/or by Pub. L. No. 94-88 (Aug. 9, 1975).

II. With respect to any mother who is an applicant or recipient under the Aid to Families with Dependent Children program who has an out of wedlock child and which mother is unable to name the father of such child because such mother in fact does not know the father's name, whether the Social Security Act as amended requires the Connecticut Commissioner of Social Services to first make a determination as to whether such mother has "good cause" for refusing to cooperate, as defined by the Social Security Act as amended and 45 C.F.R. § 303.5 and/or proposed federal regulation, 41 Fed. Reg. 34294-34301 (August 13, 1976) (proposed 45 C.F.R. Part 232), and to first provide a fair hearing before the commissioner may make any referral under § 52-440b of the General Statutes of Connecticut.

STATUTES INVOLVED

Section 404.6, effective November 1, 1975, Volume I, Chapter III, Supplement IV-D, Connecticut Department of Social Services, Public Assistance Program Manual, is the regulation whose validity is involved in this action and it is set forth in Appendix D which is attached hereto.

STATEMENT OF THE CASE

The plaintiffs in this action are all unwed mothers of illegitimate children who receive Connecticut welfare benefits under the Aid to Families with Dependent Children (A.F.D.C.) program of the Social Security Act of 1935, Sections 401 et seq., 42 U.S.C. §§ 601 et seq.[1] The plaintiffs challenged the constitutionality of § 52-440b of the General Statutes of Connecticut, a copy of such statute being hereto attached as Appendix E.[2] Under the challenged statute, the mother of any illegitimate child is legally obligated to disclose the name of her child's biological father and to prosecute a paternity action against the named putative father.[3]

The constitutionality of the challenged statute was upheld by the district court, 365 F.Supp. 65, and its decision was appealed to the United States Supreme Court, which noted probable jurisdiction, 415 U.S. 912, 94 S.Ct. 1406, 39 L.Ed. 2d 466 (1974). The United States Supreme Court va-

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[1] The plaintiffs, Hattie Hoe, Linda Robustelli, and Louis Parley, Esquire, a guardian *ad litem* for the children of the named plaintiff, were permitted to intervene in this action. Doe v. Maher, 414 F.Supp. 1368, 1371 n. 3 (D. Conn. 1976). Separate counsel was also appointed to represent the interest of the children. Doe v. Norton, 365 F.Supp. 65, 69 (D. Conn. 1973).

[2] Because of the injunctive relief sought in this action, a three-judge district court was ordered. Doe v. Norton, 356 F.Supp. 202, 203 (D. Conn. 1973). The plaintiffs' motion for preliminary injunctive relief was denied. *Id.* at 204-207.

[3] As part of a comprehensive legislative scheme, the State or any town in the State may institute a separate paternity action and subpoena the mother of the illegitimate child as a witness. § 52-440a of the General Statutes of Connecticut.

cated the district court's judgment and remanded the case to the district court

> "for further consideration in light of Pub. L. 93-647, and, if a relevant state criminal proceeding is pending, also for further consideration in light of *Younger* v. *Harris*, 401 U.S. 37, 91 S.Ct. 746, 27 L.Ed. 2d 669 (1971), and *Hoffman* v. *Pursue, Ltd.*, 420 U.S. 529, 95 S.Ct. 1200, 43 L.Ed. 2d 482 (1975)." *Roe* v. *Norton*, 422 U.S. 391, 393, 95 S.Ct. 2221, 2222, 45 L.Ed. 2d 268 (1975).

Since the Supreme Court's ruling, § 402(a), 42 U.S.C.A. § 602(a) (1976 Supp.), has been amended once again by Pub. L. No. 94-88 § 208(a) (August 9, 1975)

> ". . . so that, with this most recent amendment shown in brackets, it now reads:
>
> '§ 402(a):
>
> "A state plan for aid and services to needy families with children must
>
> . . . .
>
> '(26) provide that, as a condition of eligibility for aid, each applicant or recipient will be required —
>
> . . .
>
> '(B) to cooperate with the State (i) in establishing the paternity of a child born out of wedlock with respect to whom aid is claimed, and (ii) in obtaining support payments for such applicant and for a child with respect to whom such aid is claimed, or in obtaining any other payments or property due such applicant or such child [unless (in either case) such applicant or recipient is found to have good cause for refusing to cooperate as

determined by the State agency in accordance wth standards prescribed by the Secretary, which standards shall take into consideration the best interest of the child on whose behalf aid is claimed]; and that, if the relative with whom a child is living is found to be ineligible because of failure to comply with the requirements of subparagraphs (A) and (B) of this paragraph, any aid for which such child is eligible will be provided in the form of protective payments as described in secton 406(b)(2) (without regard to subparagraphs (A) through (E) of such section):

'(27) provide, that the State has in effect a plan approved under part D and operate a child support program in conformity with such plan.'" *Doe* v. *Maher*, supra at 1377.

Prior to the decision by the District Court after the remand by the United States Supreme Court, the Defendant-Appellant continued to exercise the provisions of § 52-440b through the implementation of § 404.6, effective November 1, 1975, Vol. I, Chap. III, Supplement IV-D, Connecticut Department of Social Services, Public Assistance Program Manual, Appendix D herein, pursuant to federal regulation, 45 C.F.R. § 303.5.[4]

On the remand from the United States Supreme Court, the District Court thereupon heard the case again on its merits modifying the original class determination, over the Defendant-Appellant's objections, as follows:

"First, the original class determination is modified to include three sub-classes. The first sub-class consists of all persons against whom contempt actions under § 52-440b

[4] Copies of § 404.6 and 45 C.F.R. § 303.5 were made full exhibits in the hearing on the merits of this action which was held before the District Court.

are currently pending. The second sub-class consists of all persons against whom action under the statute has been threatened, or will be threatened in the future, but against whom no actions are presently pending. The third sub-class consists of the children of all persons in the first and second sub-classes." *Doe* v. *Maher*, supra at 1371 n.3.[5]

On August 13, 1976, after the second decision in this case by the District Court, the Department of Health, Education and Welfare pursuant to the congressional mandate contained in Pub. L. No. 93-674, as amended by Pub. L. No. 94-88, published new proposed standards as to what constitutes "good cause" on the part of an A.F.D.C. applicant or recipient for refusing to cooperate with the State in establishing paternity of a child born out of wedlock for whom aid is claimed. 41 Fed. Reg. 34294-34301 (Aug. 13, 1976) (proposed federal regulations, 45 C.F.R. Part 232). As of the present time, these proposed federal standards or regulations have not become effective.

On remand, the three-judge District Court found that the Connecticut statute was constitutionally valid and that abstention was not required. However, the three-judge District Court further found that Public Laws Nos. 93-647 and 94-88, which conditioned A.F.D.C. eligibility on a recipient's cooperation with the State in establishing paternity unless the recipient's refusal was based on good cause, as determined in accordance with standards taking into consideration the best interest of the child, require that the Defendant-Appellant "may not find an unwed mother who refuses to cooperate in establishing the

[5] The original class determination was made as follows:
"The classes consist of:
(1) those mothers receiving A.F.D.C. assistance who refuse to comply with § 52-440b; and
(2) the illegitimate children of those mothers.
Doe v. Norton, 356 *supra* at 69.

paternity of her child born out of wedlock ineligible for benefits until he first determines that she does not have good cause for refusing to cooperate, under standards which take into account the best interest of the child." The District Court further found that the Defendant-Appellant is ". . . required to comply with such regulations as the Secretary of Health, Education and Welfare shall issue (including the right to a fair hearing). . . ." before beginning or continuing with a contempt proceeding under § 52-440b against any plaintiff in the classes or sub-classes. Based on the foregoing, the District Court "ordered that the defendant shall not remove the plaintiff mothers from the status of eligibility or begin or continue with any pending contempt proceedings against them under § 52-440b until after full compliance with the provisions of Section 402(a)(26) of the Social Security Act as amended."

THE QUESTIONS ARE SUBSTANTIAL

Section 402(a)(26) and (27) of the Social Security Act, as amended by Public Law No. 93-647 and Pub. L. No. 94-88, requires that as a condition of eligibility for A.F.D.C. assistance each applicant or recipient is required to cooperate with the State in establishing the paternity of a child born out of wedlock with respect to whom aid is claimed unless such applicant or recipient is found to have good cause for refusing to cooperate as determined by the State in accordance with standards prescribed by the Secretary of Health, Education and Welfare. The Act as amended further provides that such standards shall take into consideration the best interest of the child on whose behalf aid is claimed. At the time of the Judgment of the District Court on June 17, 1976, the aforesaid standards to be prescribed by the Secretary of Health, Education and Welfare had not been published. The new proposed federal regulations published August 13, 1976 set forth the aforesaid standards, but have not become effective as of this date. Until such new proposed federal regulations do become effective, the Secretary of Health, Education and Welfare considers federal regulation, 45 C.F.R. § 303.5, effective for the purpose of carrying out the good cause and best interest of the child provisions mandated by Congress in the Social Security Act as amended. Appendix F.

Insofar as the so-called "IV-D program" is concerned, federal regulation 45 C.F.R. § 303.5 requires the State to establish paternity of a child on whose behalf aid is claimed. Said regulation expressly states that IV-D state agency "need not attempt to establish paternity in any case involving incest or forcible rape, or in any case in which legal proceedings for adoption are pending, if, in the opinion of the IV-D agency, it would not be in the best interest of the child to establish paternity." 45 C.F.R. § 303.5(b). State welfare regulation § 404.6 (Appendix D), was one of the state welfare regulations being used by the Defendant-Appellant for the purpose of implementing the federal regulation, 45 C.F.R. § 303.5, and the state statutes, § 52-440b and § 17-82b of the General Statutes of Connecticut, in compliance with the Social Security Act as amended.[6]

Where an applicant or recpient is *unwilling* to name the father of her child, under § 404.6 she is free to claim good cause for refusing to so name the father of her child as provided by the Social Security Act as amended, § 17-82b as amended, and federal regulation, 45 C.F.R. § 303.5(b) (setting forth the existng standards as to the child's best interests policy). If the applicant or recipient so claims good cause, the Defendant-Appellant under state welfare regulation § 404.6 and State statute § 17-82b, as amended, is required to make a

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[6] State welfare regulation, § 404.6, was also being used by the Defendant-Appellant as an aid in carrying out the provisions of § 17-82b of the General Statutes of Connecticut as amended by Connecticut Public Act No. 76-334 (effective June 2, 1976). Section 17-82b expressly makes provision for the "good cause" and "best interests of the child" concept mentioned in the Social Security Act as amended.

determination of whether good cause exists for not naming the father of the child in question in accordance with the Social Security Act as amended and in accordance with the standards set forth in federal regulation, 45 C.F.R. § 303.5(b). If it is determined that good cause does not exist, only then is the applicant or recipient mother notified that she is not eligible for A.F.D.C. assistance and that she has the right to claim a fair hearing.[7] If such applicant or recipient claims a fair hearing, she remains on assistance pending the outcome of the fair hearing. If the fair hearing is unfavorable to such applicant or recipient, then she is referred under § 52-440b.[8] In a case where an applicant or a recipient mother is *unable* to name the father of the child in question because such mother does not know the name of the father of her child, such mother is not denied or removed from A.F.D.C. assistance even though she is referred under § 52-440b for the purpose of verification of the lack of her knowledge of such father's identity. § 404.6, Appendix D. Succinctly stated, the Defendant-Appellant has always complied with the good cause provision as set forth in the Social Security Act as amended in accordance with the best interest child standards set forth in the existing federal regulations, 45 C.F.R. § 303.5(b).

Insofar as the permanent injunction is concerned, the District Court has refused to recognize federal regulation, 45 C.F.R. § 303.5, as still being in effect for the purpose of carrying out the good cause and the best interests of the child provisions mandated by the Social Security Act, as amended by Pub. L. No. 93-647 and Pub. L. No. 94-88. As the new proposed federal regulations, setting forth the standards as to what constitutes good cause and the best interest of the child, have

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[7] In such cases, the children of such applicant or recipient mother are not denied or removed from A.F.D.C. assistance. § 404.6, Appendix D.

[8] If the recipient or applicant does not claim a fair hearing within the allotted time in a case where it is determined that such applicant or recipient does not have good cause for refusing to name the father of the child in question, she is referred under § 52-440b.

not become effective as of this date, the Defendant-Appellant does not have any standards with which to carry out the good cause and the best interest of the child provisions mandated by the Social Security Act as amended, except those standards under 45 C.F.R. § 303.5(b) which are not recognized by the District Court. To ignore the District Court's injunction by applying the standards set forth in 45 C.F.R. § 303.5(b) in establishing paternity is to invite a contempt citation by each member of the plaintiff classes and sub-classes. To obey the District Court's injunction, such as is being done, the Defendant-Appellant is unable to carry out presently that vital part of the policy Congress has incorporated into the Social Security Act, which is protecting the child's best interests where paternity is required to be established in cases involving applicant or recipient A.F.D.C. mothers who are unwilling or unable to disclose the name of the father of their respective children.[9] The result is that whatever rights and benefits such illegitimate children are now entitled to enjoy through the disclosure of their respective father's name are presently unattainable.[10] For some of these illegitimate children, those rights and benefits with each passing day may be forever unattainable. "The burdens of illegitimacy, already weighty, become doubly so when neither parent *nor child can legally lighten them. Weber* v. *Ætna Casualty & Surety Co.*, 406 U.S. 164, 171 (1972); emphasis added. Given the national scope of the Social Security Act

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[9] See Appendix G.

[10] Some of the rights and benefits which are attainable through the identity of the father of the illegitimate child in question are discussed in Doe v. Norton, 356 *supra* at 206, with supporting authority. Of no less importance is the right of parentage and the right of support. The running of the statute of limitations in paternity cases is a significant factor in the determination of the illegitimate child's rights and benefits.

The Defendant-Appellant is unable at this time to make any assessment of the amount of any financial loss to illegitimate children or of any financial loss to the Defendant-Appellant directly due to the permanent injunction entered by the District Court below.

as amended, the judgment of the District Court not only conflicts with the child's best interests policy insofar as the State of Connecticut's A.F.D.C. welfare program is concerned, but its influence as of necessity transcends state boundary lines and causes an impact on other state welfare programs governed under the Social Security Act.

1. With respect to the protection of the child's best interests policy as expressed in Pub. L. No. 94-88, § 208(a), it can hardly be doubted that Congress intended that some set of standards should presently govern to enforce the child's best interests policy at the present time until the aforesaid new proposed standards become effective.[11] In determining the proper construction of a statute, it is a cardinal rule that the views of the agency administering the statute have great weight. *Lewis* v. *Martin*, 397 U.S. 552, 559 (1970). It has also been stated that the circumstances and conditions confronting Congress at the time of enacting a statute are to be considered in construing that statute. *Moor* v. *County of Alameda*, 411 U.S. 693, 709 (1973). The copies of the departmental letters submitted in Appendix F herein demonstrate that the Department of Health, Education and Welfare considers the standards pertaining to the child's best interests policy in 45 C.F.R. § 303.5(b) to be in force until the new proposed standards become effective. This view on the part of the Department of Health, Education and Welfare is not out of step with Congress' intent in the passage of Pub. L. No. 93-647 and Pub. L. No. 94-88. The conditions and circumstances prevailing at the time that such Public Laws were enacted bear this point out.

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[11] It has taken the Secretary of the Department of Health, Education and Welfare over a year to publish the new proposed standards concerning the child's best interests policy. These new proposed standards may not necessarily become effective until another substantial period of time has expired.

Federal regulation, 45 C.F.R. § 303.5, became effective July 1, 1975, coinciding with the effective date of Pub. L. No. 93-647. 40 Fed. Reg. 27154, 27169 (June 26, 1975). Such federal regulation serves to implement the pertinent provisions of Part B of Pub. L. No. 93-647. 40 Fed. Reg. 19207 (May 2, 1975). Of significance is the fact that 45 C.F.R. § 303.5 became effective one month before the effective date of Pub. L. No. 94-88. Of further significance is the fact that the child's best interests policy is mentioned in 45 C.F.R. § 303.5(b), indicating that before the effective date of the regulation the Department of Health, Education and Welfare was already aware of the child's best interests policy being then considered by Congress in what was to become Pub. L. No. 94-88. The awareness of the child's best interests policy by the Department of Health, Education and Welfare before passage of Pub. L. No. 94-88 clearly shows that the Department of Health, Education and Welfare was acting in accordance with Congress' desire that standards were to become effective immediately for carrying out the child's best interests policy which Congress was considering before and at the time of enacting Pub. L. No. 94-88. Such awareness on the part of the Department of Health, Education and Welfare further shows that Congress intended that the standards pertaining to the child's best interests policy in 45 C.F.R. § 303.5(b) were to be in effect until the new proposed standards become effective. When this aspect is weighed against the absence of any language in Pub. L. No. 94-88 prohibiting the standards in 45 C.F.R. § 303.5(b) and weighed against the lack of any legislative history indicating a contrary position to 45 C.F.R. § 303.5(b), it cannot be supposed that Congress, in 1975, intended that 45 C.F.R. § 303.5(b) was to be invalidated on the passage of Pub. L. No. 94-88.

What cannot be overlooked is the further fact that 45 C.F.R. § 303.5(b) incorporates most of the standards found in the new proposed federal regulations, namely those in 45

C.F.R. § 232.13(d) (41 Fed. Reg. 34300), which circumscribe the circumstances under which establishing paternity would be considered "against the best interests of the child". Although 45 C.F.R. § 303.5(b) contains far less detail, procedure, and instruction than that provided under the new proposed federal regulations, the State under 45 C.F.R. § 303.5(b) is able to carry out the child's best interests policy in every respect as defined in the new proposed federal regulations. When this point is considered in light of the fact that nothing in the legislative history of Pub. L. No. 93-647 and Pub. L. No. 94-88 shows that 45 C.F.R. § 303.5(b) would impede carrying out the child's best interests policy as envisioned by Congress in 1975, the view held by the Department of Health, Education and Welfare that 45 C.F.R. § 303.5(b) is in force for carrying out the child's best interests policy until the new proposed federal regulations become effective should be given deference. See, e.g., *Red Lion Broadcasting Co.* v. *F.C.C.*, 395 U.S. 367, 381 (1969); *Lewis* v. *Martin*, supra at 559.

By enacting Pub. L. No. 94-88, Congress declared the intent of an earlier statute, Pub. L. No. 93-647, insofar as the child's best interests policy is concerned. Such subsequent legislation is entitled to great weight in statutory construction. *F.H.A.* v. *The Darlington, Inc.*, 358 U.S. 84, 90 (1958). Great weight is also given in statutory construction where Congress refuses to alter an administrative construction given to a law by the agency charged to administer the law. *United States* v. *Bergh*, 352 U.S. 40, 46-47 (1956). In Pub. L. No. 94-88, Congress expressly called for new standards to be submitted in the future by the Secretary of the Department of Health, Education and Welfare. Pub. L. No. 94-88; 121 Cong. Rec. S14923 (daily ed. Aug. 1, 1975). Congress' silence in Pub. L. No. 94-88 as to the present standards, 45 C.F.R. § 303.5(b), was no accident and not without purpose. Such silence was not only a refusal to overturn 45 C.F.R. § 303.5(b), but a

ratification of 45 C.F.R. § 303.5(b) until the new standards to be submitted by the Secretary of the Department of Health, Education and Welfare could become effective. The Social Security Act as amended thus contemplates that any State may exercise its welfare regulations, such as Connecticut through the exercise of state welfare regulation § 404.6, to effectuate the child's best interests policy in accordance with the standards in 45 C.F.R. § 303.5(b) until any new proposed federal regulations supplanting those standards actually become effective.

It may be that the Defendant-Appellant will be able to comply with the new proposed federal regulations once they become effective insofar as the District Court's judgment is concerned. However, this is of no moment when the Defendant-Appellant's present rights are at stake. The District Court's judgment should be reviewed with respect to the Defendant-Appellant's rights as they now stand and under the law as it now stands. See *Diffenderfer* v. *Central Baptist Church*, 404 U.S. 412, 414 (per curiam 1971).

2. The District Court ordered that the Defendant-Appellant shall not remove any plaintiff from the "status of eligibility or begin or continue with any pending contempt proceedings against" any plaintiff under § 52-440b until the Defendant-Appellant first determines that such plaintiff ". . . does not have good cause for refusing to cooperate, under the standards which take into account the best interests of the child. . . . [in] full compliance with the provisions of Section 402(a)(26) of the Social Security Act *as amended*." *Doe* v. *Maher*, supra at 1381-1382; material in parenthesis supplied; emphasis added. The standards which the District Court had in mind were the forthcoming standards, concerning the child's best interests policy, which are now found in the new proposed federal regulations, 41 Fed. Reg. 34298-34301 (Aug. 13, 1976). The District Court substantively construed Pub.

L. No. 94-88 as invalidating federal regulation, 45 C.F.R. § 303.5(b), which contains the standards that the Department of Health, Education and Welfare consider in present force for carrying out the child's best interests policy.

In footnote 20 of the District Court's opinion, two things are evident which support the claim that the District Court has enjoined the Defendant-Appellant from taking any further enforcement action under 45 C.F.R. § 303.5(b). First, the District Court concluded that § 208(a) of Pub. L. No. 94-88 in its entirety became effective on August 1, 1976. Second, the District Court concluded that where an applicant or a recipient mother refuses to disclose the name of the father of her child, the Defendant-Appellant is unable to make a determination of whether good cause exists for refusing to cooperate, under standards which take into account the best interests of the child, ". . . until the new regulations have been issued and approved." 414 F.Supp. 1381 n.20.

In reference to the good cause and the child's best interests policy requirements provided by Pub. L. No. 93-647 and Pub. L. No. 94-88, the opinion of the District Court below, following footnote 20 in the text of the opinion, states the following:

> "The defendants are required to comply with such regulations as the Secretary of HEW shall issue (including the right to a fair hearing) before continuing with the contempt proceedings against these plaintiffs. This is so even though the proceedings were commenced before the new law was enacted. *Thrope* v. *Housing Authority*, 393 U.S. 268, 282, 89 S.Ct. 518, 21 L.Ed.2d 474 (1969). Until the defendant Commissioner has made the required determinations, continuation by him of the contempt proceedings against the plaintiffs, or removing them from the welfare rolls for their failure to 'cooperate' is at the very least inappropriate. Cf. *Diffenderfer* v. *Central Baptist Church*, 404 U.S. 412, 92 S.Ct. 574, 30 L.Ed.2d 567 (1972)." 414 F. Supp. 1381-1382.

This passage quoted from the opinion of the District Court below makes clear that before the Defendant-Appellant takes any further enforcement action against any plaintiff under state regulation, § 404.6, and State Statute, § 52-440b, the Defendant-Appellant must first make the required good cause determination under standards which take into account the best interests of the child solely in compliance with such new regulations as the Secretary of the Department of Health, Education and Welfare shall issue pursuant to Pub. L. No. 94-88. This same quoted passage also provides clear warning to the Defendant-Appellant by the District Court of contempt if the Defendant-Appellant attempts to take any further enforcement action under State Regulation § 404.6, and State Statute, § 52-440b, which is not solely in compliance with the good cause requirement and the child's best interests standards in the new regulations as the Secretary of the Department of Health, Education and Welfare shall issue pursuant to Pub. L. No. 94-88.

It should be kept in mind that the District Court throughout its opinion refers to the child's best interests "standards" as the new standards to be submitted by the Secretary of the Department of Health, Education and Welfare pursuant to Pub. L. No. 94-88. The District Court's repeated references to the ehild's best interests standards as those to be submitted at some time in the future by the Secretary of the Department of Health, Education and Welfare as opposed to the District Court's silence as to 45 C.F.R. § 303.5(b), even though it had a copy of federal regulation 45 C.F.R. § 303.5(b) before it as part of Defendant-Appellant's Exhibit No. 1, lends itself to supporting the claim that the District Court has construed Pub. L. No. 94-88 so as to invalidate federal regulation 45 C.F.R. § 303.5(b). Consequently, enforcement action

under state welfare regulation § 404.6 is enjoined until the new proposed federal regulations become effective.

3. There is a class of applicants and recipient A.F.D.C. mothers who have out of wedlock children, but who do not know the name of the father of their respective children. Insofar as eligibility of A.F.D.C. assistance is concerned, these applicant and recipient A.F.D.C. mothers are willing to co-operate with the State, but are unable to provide the name of the father of their respective children because of lacking the necessary knowledge. Even though these applicant and recipient A.F.D.C. mothers are willing to cooperate under their circumstances, the good cause requirement and the child's best interests standards as defined in federal regulation, 45 C.F.R. § 303.5(b) or as defined in the new proposed federal regulations, 45 C.F.R. §§ 232.12 and 232.13 (41 Fed. Reg. 34294-34301, August 13, 1976), are not applicable to their situations. Under State Welfare regulation § 404.6 (Appendix D), these applicant and recipient A.F.D.C. mothers are referred under § 52-440b for verifying their lack of knowledge. As A.F.D.C. assistance is not denied to such mothers in the referral process, and as there is no claim of good cause or of any 'action against the best interests of the child' as these terms are defined under the 45 C.F.R. § 303.5(b) or under the new proposed federal regulations, there is no requirement under the aforesaid federal regulations nor any need to apply the good cause requirement.[12]

Even though the good cause requirement and the child's best interests standards as defined under 45 C.F.R. § 303.5(b) and under the new proposed federal regulations, 45 C.F.R. §§ 232.12 and 232.13, are not applicable where applicant or

[12] Should a particular applicant or recipient A.F.D.C. mother change her position as to not knowing the name of the father of her child, she is not barred from claiming good cause under the Social Security Act at any time.

recipient A.F.D.C. mothers do not know the name of the father of their respective children, the District Court has nevertheless defined the classes and sub-classes in the instant action so as to include such A.F.D.C. mothers. Consequently, any present referral of any of these A.F.D.C. mothers under § 52-440b by way of the state welfare regulation § 404.6, despite fully comporting with the good cause requirement and the child's best interests policy as defined in either 45 C.F.R. § 303.5(b) or in the new proposed federal regulations, would nevertheless fall within the classes and sub-classes as defined by the District Court and constitutes a violation of the District Court's injunction. In addition, the Defendant-Appellant will continue to be enjoined from exercising state welfare regulation § 404.6 as to such applicant and recipient A.F.D.C. mothers even though the Defendant-Appellant will be acting under the new proposed federal regulations, 45 C.F.R. §§ 232.12 and 232.13, once they become effective.

In an attempt to resolve the second issue, the Defendant-Appellant has submitted a motion pursuant to rule 60b of the Federal Rules of Civil Procedure and the motion is now pending before the three-judge District Court below (the motion has not been scheduled for hearing as of this date). The determination of the 60b motion by the District Court will have further impact on the status of the second issue before this Court.

It is submitted that judgment of the District Court is in direct conflict with the Social Security Act as amended in that the District Court has construed Pub. L. No. 93-647 and Pub. L. No. 94-88 so as to invalidate 45 C.F.R. § 303.5(b). As the District Court has failed to recognize 45 C.F.R. § 303.5(b) as the effective federal regulation presently in force, and as the Defendant-Appellant under said regulation and under the Social Security Act as amended is required to effectuate the good cause requirement and the child's best

interests policy now as well as after the new proposed federal regulations become effective, the judgment of the District Court presently enjoining the enforcement of state welfare regulation § 404.6 for carrying out the good cause requirement and the child's best interests policy is also in direct conflict with the Social Security Act as amended. We believe that the questions presented by this appeal are substantial and that they are of public importance.

Respectfully submitted.

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SCHEDULE OF APPENDICES.

APPENDIX A

The opinion of the three-judge District Court below which is the subject of this Appeal.

Donna DOE et al., Individually and on behalf of all others similarly situated

v.

Edward MAHER, Individually and as Commissioner of Social Services of the State of Connecticut.

Sharon ROE et al., Individually and on behalf of all others similarly situated

v.

Edward MAHER, Individually and as Commissioner of Social Services of the State of Connecticut.

Civ. Nos. 15579, 15589.
United States District Court
D. Connecticut.

June 1, 1976.

Unwed mothers of illegitimate children brought suit challenging constitutionality of Connecticut welfare statute, under which an unwed mother may be compelled to disclose the name of the child's putative father and to institute a paternity action. The District Court, 365 F.Supp. 65, dismissed, and appeal was taken. The Supreme Court, 95 S.Ct. 2221, 2222, vacated and remanded. On remand, the Three-Judge District Court, Blumenfeld, District Judge, held that abstention was not required since not only were the pending

contempt proceedings civil in nature but traditional notions of federal-state relations compelled federal intervention to enforce congressional intent underlying 1975 amendments to Social Security Act, that such amendments, which conditioned eligibility on a recipient's cooperating with the state in establishing paternity unless recipient's refusal was based on good cause, as determined in accordance with standards taking into consideration the best interests of the child, did not preempt the state law but that the "best-nterest" standard was to be applied before state contempt proceedings were instituted and before further action was taken in instant proceedings, notwithstanding that instant proceedings were instituted prior to the amendment.

Order accordingly.

Newman, District Judge, concurred in result and filed opnion.

1. Federal Civil Procedure 314

Intervention was allowed so as to assure a named plaintiff in one subclass with a live and continuing controversy. Fed. Rules Civ. Proc. rule 23(c)(1, 4), 28 U.S.C.A.

2. Constitutional Law 46(1) Courts 508(2)

Although distinction between ordering Connecticut to conform its welfare program to federal statutory requirements and merely ordering that federal funds be cut off unless it chose to comply with such requirements could be used to support ripeness analysis as regards unwed mother against whom no contempt proceedings had been commenced, it did not obviate necessity of ruling on constitutional claims of remaining plaintiff mothers, who were already subject of pending contempt proceedings, or of confronting the Younger abstention problems. C.G.S.A. § 52-440b; Social Security Act,

§§ 401 et seq., 402(a), 451 et seq., 454 as amended 42 U.S.C.A. §§ 601 et seq., 602(a), 651 et seq., 654.

3. Courts 508(2)

Although intervenor, who had been threatened with prosecution for failure to comply with Connecticut welfare statute requiring her to disclose name of putative father and commence paternity action, could be entitled to declaratory and injunctive relief on a personal basis, she could not, under guise of representing a class, dispense with the Younger abstention considerations for those class members who were presently being prosecuted and who challenged constitutional and statutory validity of the Connecticut procedure. C.G.S.A. § 52-440b.

4. Courts 508(2)

The Younger doctrine did not prohibit either granting of declaratory or injunctive relief as regards Connecticut welfare procedure whereby an unwed mother may be compelled to disclose name of child's putative father and to institute paternity action since pending state proceedings were in nature of civil, rather than criminal, contempt and challenges were not exclusively substantive, constitutional ones but involved initial determination of whether the state statute had been preempted by recent amendment to federal Social Security Act; also, there was no state forum in which plaintiffs could present their constitutional claims. C.G.S.A. § 52-440b; Social Security Act, §§ 401 et seq., 402(a), 451 et seq., 454 as amended 42 U.S.C.A. §§ 601 et seq., 602(a), 651 et seq., 654.

5. Courts 508(7)

Considerations underlying the Younger abstention doctrine, which counsels against federal court interference in pending state criminal proceeding, are the traditional reluc-

tance of federal courts to interfere with pending state criminal proceedings and the comity considerations inherent in the federal system.

6. Contempt 4

Contempt sentences imposed for violating Connecticut statute whereby an unwed mother may be compelled to disclose name of child's putative father and to institute a paternity action are primarily civil, since their purpose is to coerce testimony, rather than to vindicate the dignity of the court; to constitute criminal contempt the statute would have to be interpreted to require proof of an intent to obstruct justice and an eminent threat to the administration of justice; nature of the proceedings did not convert it into criminal contempt simply because the state would sue in place of the parent. C.G.S.A. § 52-440b.

7. Contempt 3

Fact that incarceration might be sanctioned for noncompliance with Connecticut statute whereby an unwed mother might be compelled to disclose the name of the child's putative father and institute a paternity action did not automatically render the contempt proceedings criminal in nature. C.G.S.A. § 52-440b.

8. Courts 490

Comity considerations which underlie the Younger policy of abstention on part of federal courts when it comes to interfering with ongoing state proceedings apply no less to an action because it is civil in nature rather than criminal.

9. States 4.14

Authority to invalidate a state law on preemption grounds is derived from the supremacy clause. U.S.C.A.Const. art. 6, cl. 2.

10. Courts 508(1)

Although the abstention doctrine recognizes the role of state courts as the final expositors of state law it implies no disregard for the primacy of the federal judiciary in deciding questions of federal law. U.S.C.A.Const. art. 6, cl. 2.

11. Courts 508(1)

Although lower federal courts are hesitant to interfere in ongoing state proceeding under any circumstances, the abstention doctrine is particularly inapplicable in the field of preemption since a finding that federal law has preempted application of state law would be a finding concerning the validity of the proceeding itself and not just the constitutionality of the particular statute or its particular application and would be a finding that the intrusion has already occurred; in such case, interference in state affairs would be an intrusion accomplished at the direction of Congress and one which is clearly within Congress' power to direct. U.S.C.A.Const. art. 6, cl. 2.

12. Courts 508(1)

An essential prerequisite for abstention is an available state forum in whch plaintiff can present his federal claims.

13. States 4.14

Determination of whether Connecticut welfare scheme, whereby an unwed mother may be compelled to disclose the name of the child's putative father and to institute a paternity action, was preempted by the Social Security Act was to be determined by reference to federal law as it read at date of decision rather than at time suit was instituted. C.G.S.A. § 52-440b; Social Security Act, §§ 401 et seq., 402(a), 451 et seq., 454 as amended 42 U.S.C.A. §§ 601 et seq., 602(a), 651 et seq., 654.

14. States 4.10

Existence of broad area of mutuality of purpose of state and federal authority is insufficient to completely preclude state action under the preemption doctrine. U.S.C.A.Const. art. 6, cl. 2.

15. States 4.14

Congressional purpose to displace local laws must be clearly manifested; where the federal statute has not expressly proscribed certain action but has merely been silent, there is no basis for an inference that Congress intended to forbid state supplementary action. U.S.C.A.Const. art. 6, cl. 2.

16. States 4.10

Under the preemption doctrine, the mere identity of state and congressional purpose does not furnish a sufficient basis for a finding of congressional intent that the state should refrain from taking steps beyond those which Congress requires of it to achieve their mutual purpose. U.S.C.A. Const. art. 6, cl. 2.

17. States 4.11

In determining whether a substantial conflict exists between state and federal statutes, a court must construe both as narrowly as the language and legislative history permit; only after first attempting to reconcile the statute may the court find a conflict and, thus, avoid ruling on the substantive constitutional claim. U.S.C.A.Const. art. 6, cl. 2.

18. States 4.14

Connecticut welfare statute, under which an unwed mother may be compelled to disclose name of child's putative father and to institute paternity action, is not pre-empted by 1975

amendments to Social Security Act requiring eligiblity of an unwed mother to be determined solely under standards to be established by Department of Health, Education and Welfare, provided the state does not institute contempt proceedings until the mother is found to be without good cause for refusing to cooperate, which determination is to be made under standards that take into consideration the best interests of the child. U.S.C.A.Const. art. 6, cl. 2; C.G.S.A. § 52-440b; Social Security Act, §§ 401 et seq., 402(a), 451 et seq., 454 as amended 42 U.S.C.A. §§ 601 et seq., 602(a), 651 et seq., 654.

19. Social Security and Public Welfare 194

Although 1975 amendment to Social Security Act conditioning eligibility for aid to needy families with children on the applicant's cooperating with the state in establishing paternity of a child born out of wedlock unless refusal to cooperate is based on good cause, as determined under standards taking into consideration the best interests of the child, requires that proposed regulations implementing the "best interests of the child" policy be presented to Congress for specific approval, congressional approval of such regulations is not a precondition to operation of the amendment. Social Security Act, § 402(a) as amended 42 U.S.C.A. § 602(a).

20. Contempt 61(6)

In view of fact that proceedings seeking to hold unwed mothers in contempt for failure to comply with Connecticut welfare statute, under which an unwed mother may be compelled to disclose name of child's putative father and to institute a paternity action, were commenced before 1975 amendments to Social Security Act conditioning such proceedings on a finding of want of good cause for refusal to cooperate, with finding to be made under standards taking into account the best interests of the child, the state was required to comply with the amended act before continuing with the contempt

proceedings. C.G.S.A. § 52-440b; Social Security Act, §§ 401 et seq., 402(a), 451 et seq., 454 as amended 42 U.S.C.A. §§ 601 et seq., 602(a), 651 et seq., 654.

David N. Rosen, Rosen & Dolan, Edward J. Dolan, New Haven, Conn., Frank Cochran, Conn. Civil Liberties Union Foundation, Inc., Hartford, Conn., Stephen Wizner, New Haven, for plaintiffs.

Michael Anthony Arcari, Asst. Atty. Gen., Hartford, Conn., for defendant.

Before TIMBERS, Circuit Judge, and BLUMENFELD and NEWMAN, District Judges.

MEMORANDUM OF DECISION

BLUMENFELD, District Judge:

An earlier decision in this action[1] was appealed to the Supreme Court, which noted probable jurisdiction, 415 U.S. 912, 94 S.Ct. 1406, 39 L.Ed.2d 466 (1974). Thereafter the Court vacated the judgment and remanded the case to this court

> "for further consideration in light of Pub.L. 93-647, and, if a relevant state criminal proceeding is pending, also for further consideration in light of *Younger* v. *Harris*, 401 U.S. 37, 91 S.Ct. 746, 27 L.Ed.2d 669 (1971), and *Huffman* v. *Pursue, Ltd.*, 420 U.S. 592, 95 S.Ct. 1200, 43 L.Ed. 2d 482 (1975)."

Roe v. *Norton*, 422 U.S. 391, 393, 95 S.Ct. 2221, 2222, 45 L.Ed. 2d 268 (1975).

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[1] This opinion assumes knowledge of our original opinion, *Doe* v. *Norton*, 365 F. Supp. 65 (D.Conn.1973); several issues discussed in that decision will not be repeated here. The present Commissioner of Social Services, Edward Maher, has been substituted as a defendant pursuant to Rule 25(d)(1), Fed.R.Civ.P.

[1, 2] In our original opinion, we upheld the constitutionality of Conn. Gen. Stat. Ann. § 52-440b (1976 Supp.)[2] against claims that it denied due process and equal protection, invaded the plaintiffs' rights to privacy and conflicted with the purposes of the Social Security Act. Upon remand, this court has received briefs and heard arguments on all the issues to aid it in its further consideration of the case.[3]

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[2] Conn.Gen.Stat.Ann. § 52-440b (1976 Supp.) reads:

> "(a) If the mother of any child born out of wedlock, or the mother of any child born to any married woman during marriage which child shall be found not to be issue of the marriage terminated by a *decree of divorce or dissolution* or by decree of any court of competent jurisdiction, fails or refuses to disclose the name of the putative father of such child under oath to the welfare commissioner, if such child is a recipient of public assistance, or to a selectman of a town in which such child resides, if such child is a recipient of general assistance, or otherwise to a guardian or a guardian ad litem of such child, such mother may be cited to appear before any judge of the *court of common pleas* [assigned to a geographical area] and compelled to disclose the name of the putative father under oath and to institute an action to establish the paternity of said child.
>
> "(b) Any woman who, having been cited to appear before a judge of the *court of common pleas* pursuant to subsection (a), fails to appear or fails to disclose or fails to prosecute a paternity action may be found to be in contempt of said court and may be fined not more than two hundred dollars or imprisoned not more than one year or both."
>
> The bracketed material was added when the statute was amended in 1975. P.A. No. 75-406, § 6. The italicized material was substituted for "divorce decree" and "circuit court" respectively in 1974. P.A. No. 74-183, § 110. The merger of the circuit courts into the courts of common pleas is discussed at note 12 *infra*.

[3] We have also taken two further procedural steps. First, the original class determination is modified to include three sub-classes. The first sub-class consists of all persons against whom contempt actions under § 52-440b are currently pending. The second sub-class consists of all persons against whom action under the statute has been threatened, or will be threatened in the future, but against whom no actions are presently pending. The third sub-class consists of the children of all persons in the first and second sub-classes. Rule 23(c)(1), (4), Fed.R.Civ.P.

Second, the motions of Hattie Hoe, Linda Robustelli, and Louis Parley, Esq., as guardian *ad litem* for the children of the named plaintiffs, to intervene in this action are granted. Rule 24(b), Fed.R.Civ.P. Ms. Hoe, against whom an action was commenced on June 30, 1975, is allowed to intervene to assure a named plaintiff in the first sub-class with a live and continuing controversy. *See Hagans* v. *Wyman*, 527 F.2d 1151, 1153 (2d Cir. 1975). Ms. Robustelli and Mr. Parley are allowed to intervene as the named representatives of the second and third sub-classes, respectively. We

We have been instructed to reconsider two different aspects of federalism, abstention and pre-emption. We turn first to the issue of abstention.[4]

I. Abstention in Light of *Younger* v. *Harris*

[3, 4] The fact that the adult plaintiffs in this action, with the exception of the intervenor, Linda Robustelli, are defendants in pending contempt proceedings instituted by the Commissioner under the authority of § 52-440b (1976 Supp.), raises a serious issue of abstention in light of *Younger* v. *Harris*, 401 U.S. 37, 91 S.Ct. 746, 27 L.Ed.2d 669 (1971),[5] and its

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reaffirm our earlier finding as to the propriety of a class action and the ability of all the named plaintiffs, including the intervenors, to represent their respective sub-classes. Rule 23(b)(2), Fed.R.Civ.P.

[4] The concurrence relies on the distinction articulated by Justice Harlan in *Rosado* v. *Wyman*, 397 U.S. 397, 420, 90 S.Ct. 1207, 25 L.Ed.2d 442 (1970), between ordering New York to conform its welfare program to federal statutory requirements and merely ordering that its federal funds be cut off unless it chooses to comply with those requirements, to avoid both the abstention and constitutional issues in this case. While we agree with Judge Newman's ripeness analysis as it affects plaintiff Linda Robustelli, against whom no contempt proceeding has commenced as yet, we disagree that it also obviates the necessity of ruling on the remaining plaintiff mothers' constitutional claims, or of confronting the *Younger* abstention problem.

Plaintiffs Roe and Doe have been ordered to disclose the names of their children's fathers. They have refused to do so. Contempt proceedings have been instituted against them in state court, and are pending at the present time. They have sought an injunction halting those proceedings from this court, claiming that their constitutionally protected privacy interests are being infringed.

Simply ordering the Commissioner to give up federal funding unless he complies with the Social Security Act would not halt the pending contempt cases. While we agree with Judge Newman regarding the Commissioner's likely decision, that prediction cannot properly be the basis for a conclusion that these constitutional claims are not ripe for adjudication. These plaintiffs have taken affirmative steps in violation of the Connecticut statute they challenge. Thus, they are in a very different position than were the plaintiffs (except George Poole) in *United Public Workers* v. *Mitchell*, 330 U.S. 75, 67 S.Ct. 556, 91 L.Ed. 754 (1947). And, unlike the plaintiffs in *Laird* v. *Tatum*, 408 U.S. 1, 92 S.Ct. 2318, 33 L.Ed.2d 154 (1972), they have a valid "claim of specific present objective harm [and] a threat of specific future harm." 408 U.S. at 14, 92 S.Ct. at 2326. There is no ripeness problem here. Accordingly, we must consider their constitutional claims, and the preliminary question of abstention to which the Supreme Court directed our attention.

[5] The following actions are currently pending in Connecticut courts. This court has been informed that the State has voluntarily stayed

progeny. The intervention of Ms. Robustelli, who has been threatened with prosecution, but against whom no action is presently pending, cannot circumvent the issue, for while she may be entitled to declaratory and injunctive relief on a personal basis, *Doran* v. *Salem Inn, Inc.*, 422 U.S. 922, 95 S.Ct. 2561, 45 L.Ed.2d 648 (1975), she cannot, under the guise of representing a class, dispense with the *Younger* considerations for those members of the class who are presently being prosecuted. "The requirements of *Younger* are not to be evaded by artificial niceties." *Allee* v. *Medrano*, 416 U.S. 802, 833, 94 S.Ct. 2191, 2209, 40 L.Ed.2d 566 (1974) (Burger, C. J., concurring in the result in part and dissenting in part). *Cf. Allee* v. *Medrano*, 416 U.S. at 816 n. 10, 94 S.Ct. 2191. However, in the opinion of this court *Younger* does not prohibit the issuance of an injunction or declaratory relief in this action. This conclusion is founded upon a determination that neither of the considerations which support the *Younger* doctrine apply in the circumstances of this case, and, in addition, a finding that the plainttiffs lack a state forum in which they can adequately present their constitutional arguments. The latter is an essential prerequisite to abstention under the *Younger* doctrine.

A. *The Pending State Proceedings are not Criminal.*

[5-7] The first consideration which underlies the *Younger* abstention doctrine is the traditional reluctance of federal courts to interfere with pending state criminal prosecutions. *Younger*, 401 U.S. at 43, 91 S.Ct. 746; *Douglas* v. *City of Jeannette*, 319 U.S.. 157, 63 S.Ct. 877, 87 L.Ed., 1324 (1943); *Fenner* v. *Boykin*, 271 U.S. 240, 46 S.Ct. 492, 70 L.Ed. 927

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the proceedings involving the named plaintiffs pending the outcome of this suit. No injunctions have been issued by this court. *White* v. *S. J.*, No. DN CV6-58218 (Ct. of Com.Pl., 6.A.6, New Haven Co.); *White* v. *V.P.*, No. DN CV6-58219 (Ct. of Com.Pl., 6.A.6, New Haven Co.); *Maher* v. *H.P.* (no Docket No.) (Ct. of Com.Pl., New Haven Co., June 30, 1975).

(1926). This consideration does not apply to the present case, however, because the pending state proceedings are in the nature of civil rather than criminal contempt.[6]

Under § 52-440b, it is the Commissioner of Social Services, not a district attorney, who has a woman who refuses to cooperate with the Department of Social Services cited to appear before a judge of the court of common pleas. This factor alone has been held to distinguish civil from criminal contempt in this circut. *In re Kahn,* 204 F. 581 (2d Cir. 1913). And *see In re Guzzardi,* 74 F.2d 671 (2d Cir. 1935).

The more general tests established by the Supreme Court to distinguish between civil and criminal contempt, *Shillitani* v. *United States,* 384 U.S. 364, 86 S.Ct. 1531, 16 L.Ed.2d 622 (1966); *Gompers* v. *Bucks Stove & Range Co.,* 221 U.S. 418, 31 S.Ct. 492, 55 L.Ed. 797 (1911); serve to strengthen the conclusion that contempt sentences administered under § 52-440b are primarily civil, for their purpose would be to coerce testimony, rather than to vindicate the dignity of the court. *Compare Shillitani, with United States* v. *Seale,* 461 F.2d 345 (7th Cir. 1972). In order to constitute criminal contempt, the statute would have to be interpreted to require proof of an intent to obstruct justice and an imminent threat to the administration of justice. *In re Williams,* 509 F.2d 949 (2d Cir. 1975).

Connecticut law recognizes and applies this distinction. As the Connecticut Supreme Court has recently stated:

> "In any event, in 1965 (prior to the commencement of the present proceedings), . . . the basic statute pursuant to which the previous proceedings were instituted was enacted as § 52-435a in chapter 911 entitled "Paternity

[6] Title 52 of the Conn.Gen.Stat.Ann. is entitled "Civil Actions." While this alone is not determinative, it is illustrative of the intent of the Connecticut legislature.

> Proceedings." No longer is there any reference in that section to quasi-criminal procedures such as arrest, pleas of guilty or not guilty, hearing on probable cause or binding over for trial. A plaintiff's paternity action has been stripped of any quasi-criminal characteristics and clearly converted to an unmistakable civil action."

Robertson v. *Apuzzo,* Conn. —— A.2d —— at ——, ——, 37 Conn.L.J. No. 38 (1976).

These contempt proceedings are therefore not "more akin to [a] criminal prosecution[s]" than to civil actions and they are not "in aid of and closely related to criminal statutes." *Cf Huffman* v. *Pursue, Ltd.,* 420 U.S. 592, 604, 95 S.Ct. 1200, 1208, 43 L.Ed.2d 482 (1975). And the nature of the proceeding is not converted to criminal simply because, under the statute in question, the State is suing in place of the parent. The stated purpose of § 52-440b is to allow the State to institute and successfully prosecute a paternity action and to recover support for the child. Rather than a criminal prosecution, the action is instead more in the nature of a civil debt collection.[7] The Welfare Commissioner is acting primarily as the guardian of the child, securing its rights, rather than as a criminal prosecutor or law enforcement officer "charged with

[7] In discussing contempt proceedings for the closely related purpose of enforcing support orders, once paternity has been established, the Connecticut Supreme Court stated:

> "It is obvious that the contempt proceedings authorized by § 52-442 are remedial in purpose, designed to operate in a prospective manner and to coerce, rather than to punish, the contemnor to comply with the order of the court. . . . The provisions for accomplishing execution of the court's money judgment and for contempt proceedings for failure to comply with the orders of the court do not convert the plaintiff's cause of action out of which the defendant's contempt of court arose from a civil to a criminal one."

Robertson v. *Apuzzo,* Conn., _____ A.2d _____ at _____, _____, 37 Conn.L.J. No. 38 (1976). Similarly, the fact that incarceration may be the sanction for non-compliance does not automatically make these proceedings criminal in nature. *Cf. Middendorf* v. *Henry,* _____ U.S., _____, 96 S.Ct. 1281, 47 L.Ed.2d 556 (1976).

the duty of prosecuting offenders against the laws of the state . . . [who] must decide when and how this is to be done."

Fenner v. *Boykin*, 271 U.S. at 243-244, 46 S.Ct. at 493, *quoted* in *Younger*, 401 U.S. at 45, 91 S.Ct. 746. *But cf. Lynch* v. *Household Finance Corp.*, 405 U.S. 538, 556-61, 92 S.Ct. 1113, 31 L.Ed.2d 424 (1972) (White, J., dissenting).

If these contempt proceedings can be said to be "in aid of and closely related to" any particular statute, it is the federal Social Security Act, and not any particular criminal law of the State of Connecticut. In these circumstances, the element of *Younger* which rests upon the traditional reluctance of courts of equity to interfere with a criminal prosecution simply does not "mandate restraint." *Cf. Huffman*, 420 U.S. at 604, 95 S.Ct. 1200.

B. *Federalism*

[8] The comity considerations inherent in our federal system provide the second rationale for the *Younger* policy of abstention. *See Younger*, 401 U.S. at 44, 91 S.Ct. 746. As *Huffman* made clear, these considerations apply no less to an action because it is civil in nature rather than criminal. There, the Court stated that:

> "Central to *Younger* was the recognition that ours is a system in which 'the National Government, anxious though it may be to vindicate and protect federal rights and federal interests, always endeavors to do so in ways that will not unduly interfere with the legitimate activities of the States.' [*Younger*, 401 U.S. at 44, 91 S.Ct. 746]."

Huffman, 420 U.S. at 601, 95 S.Ct. at 1207. *See Rizzo* v. *Goode*, 423 U.S. 362, 96 S.Ct. 598, 46 L.Ed.2d 561 (1976).

However, given the nature of the plaintiffs' claims in this action, traditional notions of federal-state relations, rather than requiring abstention, impel this court to intervene, not only to protect the plaintiffs' constitutional rights, but also to enforce the congressional intent underlying the recent amendments to the Social Security Act.

Younger, and the cases which follow it, involved, in essence, an attempt by a defendant in a pending state court proceeding to remove the action to federal court, without congressional authorization, based solely upon the dual claims that his constitutional rights had been or were being violated, and the expressed or unexpressed belief that federal courts were somehow more sympathetic to constitutional rights. These arguments were conclusively rejected in *Huffman:*

> ". . . Art. VI of the United States Constitution declares that 'the Judges in every State shall be bound' by the Federal Constitution, laws, and treaties. Appellee is in truth urging us to base a rule on the assumption that state judges will not be faithful to their constitutional responsibilities. This we refuse to do."

420 U.S. 611, 95 S.Ct. 1211.

[9] However, the challenges mounted by the plaintiffs in the present case are not exclusively substantive, constitutional ones. Consequently, the federalism issue must be viewed in a slightly different focus. Before this court can reach the plaintiffs' constitutional claims, it must first consider their claim that the state statute has been preempted by the recent amendments to the Social Security Act and the regulations to be promulgated thereunder. Although authority to invalidate a state law on preemption grounds is derived from the supremacy clause,[8] the test of the Connecticut statute's invalidity is

[8] *U.S.Const.* art. VI, clause 2.

whether it conflicts with federal legislation, not with a specific provision of the Constitution. The preemption doctrine, therefore, primarily involves the exercise of statutory interpretation, *i.e.*, the determination, in the absence of specific direction, of the congressional intent behind a specific statute or regulatory program. *Cf. Swift & Co.* v. *Wickham*, 382 U.S. 111, 86 S.Ct. 258, 15 L.Ed.2d 194 (1965).[9]

Federalism requires a different result in cases turning on the interpretation of federal statutes than it does in the cases presented in the *Younger* line of decisions. In addition to their special expertise in the interpretation of federal statutes, federal courts are more likely to give the proper emphasis to congressional intent and the necessary supremacy of federal law in the case of an actual conflict between federal and state legislation. Although all judges, state and federal, are sworn to uphold the federal laws and Constitution, state judges are not sworn to protect the legitimate interests of the national government at the expense of the legitimate interests of their own state sovereigns.

[10] This is not to say that pre-emption is common, or that it is a doctrine which should be aggressively applied by federal courts. Nor is it to say that state courts are not capable of giving proper weight to the national interests underlying federal legislation. It is simply a recognition that considerations of federalism necessarily recognize an area of expertise in each of the two overlapping court systems. As the Supreme Court

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[9] Justice Harlan, in his opinion in *Swift*, concluded that an action for an injunction against a state statute on the ground of pre-emption did not require convocation of a three-judge district court. He pointed out the distinction between the supremacy clause and the "substantive provisions" of the constitution, and reasoned that comity considerations were minimal in pre-emption cases. This position has recently been reaffirmed in *Moe* v. *Confederated Salish and Kootenai Tribes*, _____ U.S. _____, 96 S.Ct. 1634, 48 L.Ed.2d 96 (1976).

*See Kurland, *Toward a Co-operative Judicial Federalism: The Federal Court Abstention Doctrine*, 24 F.R.D. 481, 487.

stated in *England* v. *Louisiana State Board of Medical Examiners*, 375 U.S. 411, 415-16, 84 S.Ct. 461, 465, 11 L.Ed.2d 440 (1964):

> "Abstention is a judge-fashioned vehicle for according appropriate deference to the 'respective competence of the state and federal court systems.' *Louisiana P. & L. Co.* v. *Thibodaux*, 360 U.S. 25, 29 [79 S.Ct. 1070, 3 L.Ed.2d 1058]. Its recognition of the role of state courts as the final expositors of state law implies no disregard for the primacy of the federal judiciary in deciding questions of federal law.* "[10]

[11] This distinction, between plaintiffs' claims based on substantive constitutional grounds and those based on pre-emption, is especially important for yet another reason. An additional factor in *Younger* cases is the hesitancy of lower federal courts to interfere in an ongoing judicial proceeding under any circumstances. A finding of pre-emption, however, is a finding that the intrusion has already occurred. If this court were to conclude that the recent amendments to the Social Security Act pre-empted any application of § 52-440b, it would be a finding that for reasons of national policy Congress had intended that the pending state court actions should not have been instituted. It would be a finding concerning the validity of the proceeding itself, not just concerning

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[10] The recognition of the special expertise of the lower federal courts has been reaffirmed as recently as *Steffel* v. *Thompson*, 415 U.S. 452, 464, 94 S.Ct. 1209, 1218, 39 L.Ed.2d 505 (1974). In that decision the Court cited F. Frankfurter & J. Landis, *The Business of the Supreme Court* 65 (1928), and emphasized that:

> "With this latter enactment [of the Judiciary Act of March 3, 1875], the lower federal courts 'ceased to be restricted tribunals of fair dealing between citizens of different states and became the *primary* and powerful reliances for vindicating every right given by the Constitution, the laws, and treaties of the United States.'" (Emphasis added in Supreme Court opinion.)

And *see Colorado River Water Conservation District* v. *United States*, _____ U.S. _____, 96 S.Ct. 1236, 47 L.Ed.2d 483 (1976).

the constitutionality of the particular statute or its particular application. While this would clearly be an intrusion into a legitimate sphere of the state interest, it would be an intrusion accomplished at the direction of Congress, and one which is clearly within Congress' power to direct.

For these reasons we conclude that notions of federalism, the second consideration underlying the *Younger* doctrine, likewise do not compel us to refuse to intervene in this action.

C. *Availability of a State Forum*

[12] Finally, there is an independent ground upon which abstention must be rejected. An essential prerequisite of abstention, *viz.* a forum in which the plaintiffs can present their constitutional claims, is not available under the special facts of this case.

In *Gibson* v. *Berryhill*, 411 U.S. 564, 577, 93 S.Ct. 1689, 1696, 36 L.Ed.2d 488 (1973), the Supreme Court stated:

> ". . . *Younger* v. *Harris* contemplates the outright dismissal of the federal suit, and the presentation of all claims, both state and federal, to the state courts. Such a course naturally presupposes the opportunity to raise and have timely decided by a competent state tribunal the federal issues involved."

And *see Huffman*, 420 U.S. at 594, 95 S.Ct. 1200.

Under the terms of § 52-440b, the Commissioner has the recalcitrant mother cited to appear before a judge of the court of common pleas. There she is ordered by the judge to testify and/or to institute a paternity action. If she refuses to do either she may be found in contempt of court. The statute contemplates a summary procedure, and does not appear on its face to allow the mother the right to challenge the authority

of the Commissioner to institute the proceedings, the central issue in this case. The summary contempt procedure apparently intended by the statute, and as disclosed in the transcripts included in the record, does not appear to allow the mother an opportunity to fully litigate any defenses, much less complex constitutional and statutory issues. *Cf. New Haven Tenants' Representative Council, Inc.* v. *Housing Authority of City of New Haven*, 390 F.Supp. 831 (D.Conn. 1975).

Furthermore, if we look beyond the theoretical concept of a court trial and consider the unique Connecticut philosophy, it appears that the court of common pleas might refuse to consider any constitutional challenge. In *State* v. *Muolo*, 119 Conn. 323, 326, 176 A. 401, 403 (1935), the Connecticut Supreme Court stated:

> "In the absence of constitutional or statutory prohibition, any court has power to pass on the constitutionality of a statute and it may be its duty to declare it invalid, but a proper regard for the great co-ordinate branch of our government, the legislative, and for the preservation of the respect of our citizens, who are apt to look askance upon a decision of a court so limited in its jurisdiction as the city court of New Haven holding invalid the considered legislative judgment, dictates that such a court should take such action only upon the clearest ground or where the rights of litigants make it imperative that it should do so. Otherwise it is better for such a court to leave the decision to our higher courts, to which the matter may be brought by appeal or otherwise."

While this may appear to leave room for a common pleas court to pass on constitutional issues and even to mandate that they do so in "imperative" cases, the doctrine has evolved to the point where the lower courts in Connecticut have refused

to hear constitutional defenses in criminal prosecutions,[11] not to mention welfare cases.[12]

Since there is no guarantee that the plaintiffs would be able to raise their constitutional and statutory defenses in the pending state proceedings, which is the fundamental point on which abstention rests *Younger* does not prevent the intervention of this court at this stage to protect the plaintiffs' rights to litigate those issues.

Having decided, for the several reasons set forth above, that our exercise of jurisdiction over this case does not jeopardize federal-state relations within the sphere of judicial authority, we turn next to the question of whether, at the legislative level, the laws enacted by the Congress conflict with the Connecticut statute challenged in this case under the supremacy clause.

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[11] *See* Children's Exhibit "B" on Remand. This exhibit consists of three memorandum decisions refusing to deal with constitutional issues in criminal cases. In each case the circuit court (now the court of common pleas) relied on *State* v. *Muolo*.

[12] *Helm* v. *Welfare Commissioner*, 32 Conn. Sup. 595, 600, 348 A.2d 317, 321 (Super.Ct.App.Sess.1975). On review of a circuit court decision, the three-judge panel held:

> "Initially the plaintiff assigned as error the court's failure to consider the plaintiff's constitutional claims. The court below did not err in holding that constitutional questions should be left to a court of higher jurisdiction. *State of Muolo*, 119 Conn. 323, 326 [176 A. 401.]"

It may be noted that in 1974, Connecticut reorganized its judicial system so as to consolidate its civil courts into a unified system of courts of common pleas. 1974, P.A. No. 74-183. This new system became effective on December 31, 1974.

Although the decisions cited above all arose in the old circuit courts, there is no reason to believe that the new courts of common pleas will be any more willing to entertain constitutional arguments. Under the new system, the court of common pleas is, like its predecessor, a court of limited jurisdiction. Conn.Gen.Stat.Ann. § 52-6 (1976 Supp.). Appeals from its decisions are taken to the Appellate Session of the superior court, the trial court of general jurisdiction. § 52-6a (1976 Supp.).

Helm v. *Welfare Commissioner*, *supra*, involved an appeal from a circuit court, but taken under the new appellate procedure. In the opinion, which upholds the continued validity of *State* v. *Muolo*, the court does not suggest that the demise of the circuit courts has in any way weakened the effect of the doctrine.

II. Pre-emption

[13] Preliminarily it should be noted that although this issue was considered in this court's earlier opinion,[13] the issue of pre-emption now comes before us in a somewhat different posture because of new federal laws enacted since that time. We must, therefore, consider this issue "in light of [the law] as it now stands, not as it once did." *Hall* v. *Beals*, 396 U.S. 45, 48, 90 S.Ct. 200, 201, 24 L.Ed.2d 214 (1969).

In its mandate to this court, the Supreme Court noted:

> ". . . [S]ince that time Pub.L. 93-647, 88 Stat. 2337, was enacted. Pub.L. 93-647 amends § 402(a) of the Social Security Act to require parents, as a condition of eligibility for AFDC assistance, to cooperate with state efforts to locate and obtain support from absent parents but provides no punitive sanctions comparable to that provided by Conn.Gen.Stat. Rev. § 52-440b (1973)."

Section 402(a), 42 U.S.C.A. § 602(a) (1976 Supp.), has been amended once again since the Supreme Court's ruling by Pub.L. No. 94-88 § 208(a) (Aug. 9, 1975) so that, with this most recent amendment shown in brackets, it now reads:

> "§ 402(a):
>
> "A state plan for aid and services to needy families with children must. . . .
>
> "(26) provide that, as a condition of eligibility for aid, each applicant or recipient will be required —
>
> ". . .
>
> "(B) to cooperate with the State (i) in establishing the paternity of a child born out of wedlock with respect

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[13] 365 F.Supp. at 70-73.

to whom aid is claimed, and (ii) in obtaining support payments for such applicant and for a child with respect to whom such aid is claimed, or in obtaining any other payments or property due such applicant or such child [unless (in either case) such applicant or recipient is found to have good cause for refusing to cooperate as determined by the State agency in accordance with standards prescribed by the Secretary, which standards shall take into consideration the best interests of the child on whose behalf aid is claimed]; and that, if the relative with whom a child is living is found to be ineligible because of failure to comply with the requirements of subparagraphs (A) and (B) of this paragraph, any aid for which such child is eligible will be provided in the form of protective payments as described in section 406(b)(2) (without regard to subparagraphs (A) through (E) of such section);

"(27) provide, that the State has in effect a plan approved under part D and operate a child support program in conformity with such plan."

Whatever one may think of the wisdom of these new amendments, which now condition eligibility for welfare assistance on cooperation in locating and obtaining support from absent parents and which require the State to set up a separate program to accomplish this result, it is readily apparent that Congress had strong views in favor of the enforcement of the parental obligations of fathers of children of unwed mothers.[14]

[14] In looking to the circumstances existing at the time the amendment was made, *see Moor* v. *County of Alameda*, 411 U.S. 693, 709, 93 S.Ct. 1785, 36 L.Ed.2d 596 (1973), it may be noted that the intensive consideration given to the problem of securing parental support for the children of unwed mothers was not by any means accidental. Congress was aware of the fact that the number of AFDC recipients whose fathers were absent from the home had increased from 2.4 million persons in 1961 to 8.7 million by the end of June 1974. *See* legislative history of Pub.L. No. 93-647, 1974 U.S.Code Cong. & Admin.News, 93d Cong., 2d Sess., Vol. 4, at 8145-56.

Many strands have been woven together (including incentives for both the family and the State) in the establishment of this new legislation designed to enforce the obligations of the absent parent. Indeed, the new provisions added to Title IV of the Social Security Act by Pub.L. No. 93-647 are so comprehensive that Congress established a new "Part D — *Child Support And Establishment Of Paternity*" to embrace them. Pub.L. No. 93-647 § 101 (Jan. 4, 1974), U.S.Code Cong. & Admin. News, 93d Cong., 2d Sess., Vol. 2, at 2716, 2732-43.[15] Detailed explication of all of them is not necessary for purposes of considering the pre-emption claim of the plaintiffs. In essence, the new amendments make an unwed mother who refuses to cooperate ineligible for benefits, a result which this court earlier held to be an illegal deprivation of benefits to her. *Cf Doe* v. *Norton*, 365 F.Supp. at 71-72 and n. 8. To protect against an arbitrary denial of benefits, the new legislation specifically requires that the mother may not be found ineligible if she "is found to have good cause for refusing to cooperate," under standards that "shall take into consideration the best interests of the child on whose behalf aid is claimed." We turn now to consider whether the Connecticut legislation conflicts with the federal statute as so amended to such a degree that the state statute must be struck down.

[15] Since Social Security was first enacted nearly 40 years ago, Congress has constantly revised it. In addition to the amendment of § 402(a) by Pub.L. No. 93-647 (Jan. 4, 1974), to provide that an unwed mother's eligibility should be conditioned on a certain amount of cooperation with State efforts to locate and obtain support from absent parents, of relevance also is new § 454, 42 U.S.C.A. § 654 (1976 Supp.), which in essence requires that a State plan must provide a single separate organizational unit (as the Secretary may by regulation prescribe) to undertake to establish paternity of a child born out of wedlock. § 454(4)(B). It also requires that the plan provide that "the child support collection or paternity determination services established under the plan shall be made available to any individual not otherwise eligible for such services. . . ." § 454(6)(A).

New § 457, 42 U.S.C.A. § 657 (1976 Supp.), deals with "Distribution of Proceeds;" it provides:

"(a) . . .

"(1) 40 per centum of the first $50 of [monthly support payments collected] shall be paid to the family without any

The argument for pre-emption is that the application of the state's statute will obstruct the effectuation of the federal policy expressed in the above statutory provisions to such a degree that the state interests must yield. Viewing the new Part D from that perspective, it cannot be denied that Congress has adopted a very expansive program for establishing paternity and collecting support, one calling for the exercise of power on so many fronts that very little area is left open for state action.

[14-16] But the existence of this broad area of mutuality of purpose of state and federal authority is insufficient to completely preclude state action. *DeCanas* v. *Bica*, —— U.S. ——, 96 S.Ct. 933, 47 L.Ed.2d 43 (1976). Thus, the argument that § 52-440b is invalid because Congress has not chosen to require contempt proceedings against an uncooperative mother cannot be sustained. Congressional purpose to displace local laws must be clearly manifested. *H. P. Welch Co.* v. *New Hampshire*, 306 U.S. 79, 85, 59 S.Ct. 438, 83 L.Ed. 500 (1939). Where the federal statute has not expressly proscribed certain action but has merely been silent there is no basis for an inference that Congress intended to forbid state supplementary action.

> ". . . [T]he intent to supersede the exercise by the state of its police power as to matters not covered by the Federal legislation is not to be inferred from the mere fact that Congress has seen fit to circumscribe its regulation

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decrease in the amount paid as assistance to such family during such month."

Sections 454(4)(A) and (B), 42 U.S.C.A. § 654(4)(A), (B) (1976 Supp.), which were to be parts of the State plan for child support, were further amended by Section 208(b) and (c) of Pub.L. No. 94-88 (Aug. 9, 1975), which qualified the state's duty to establish paternity and compel support. These actions are to be undertaken

> ". . . unless the agency administering the plan of the State determines in accordance with the standards prescribed by the Secretary pursuant to 602(a)(26)(B) of this title that it is against the best interests of the child to do so."

> and to occupy a limited field. In other words, such intent is not to be implied unless the act of Congress fairly interpreted is in actual conflict with the law of the state. This principle has had abundant illustration." (Citations omitted.)

Savage v. *Jones*, 225 U.S. 501, 533, 32 S.Ct. 715, 726, 56 L.Ed. 1182 (1912). Nor does the identity of state and congressional purpose furnish a sufficient basis for a finding of congressional intent that the state should refrain from taking steps beyond those which Congress requires of it to achieve their mutual purpose. When a similar argument was presented in *New York State Department of Social Services* v. *Dublino*, 413 U.S. 405, 415, 93 S.Ct. 2507, 2514, 37 L.Ed.2d 688 (1973), the Court responded:

> "We do not agree. We reject, to begin with, the contention that pre-emption is to be inferred merely from the comprehensive character of the federal work incentive provisions. . . ." [16]

And *see DeCanas* v. *Bica*, —— U.S. ——, 96 S.Ct. 933, 47 L.Ed.2d 43 (1976).

In *Hines* v. *Davidowitz*, 312 U.S. 52, 67, 61 S.Ct. 399, 404, 85 L.Ed. 581 (1941), Justice Black observed that in considering whether state laws were pre-empted by federal laws dealing with the same subject, the Court

> "has made use of the following expressions: conflicting; contrary to; occupying the field; repugnance; difference; irreconcilability; inconsistency; violation; curtailment;

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[16] The Court explained:

> "The subjects of modern social and regulatory legislation often by their very nature require intricate and complex responses from the Congress, but without Congress necessarily intending its enactment as the exclusive means of meeting the problem."

413 U.S. at 415, 93 S.Ct. at 2514.

and interference. But none of these expressions provides an infallible constitutional test or an exclusive constitutional yardstick. In the final analysis, there can be no one crystal clear distinctly marked formula. . . ."

While none of these is an inappropriate description of pre-emption formulae in earlier cases, the difficulties which formerly attended a determination of pre-emption have been reduced.[17] There has been a shift from the multifarious theories that formerly underlay pre-emption to a much narrower field for judicial analysis.

[17] While ". . . prior cases on pre-emption are not precise guidelines," *City of Burbank* v. *Lockheed Air Terminal, Inc.*, 411 U.S. 624, 638, 93 S.Ct. 1854, 1862, 36 L.Ed.2d 547 (1973), the situation here is comparable to that in *Dublino* where the Court held that state work incentive programs in the administration of the AFDC program, which were complementary to those of HEW, were not pre-empted. In that case the crux of the test for pre-emption in the context of AFDC legislation is clearly set forth:

> "In considering the question of possible conflict between the state and federal work programs, the court below will take into account our prior decisions. Congress 'has given the States broad discretion,' as to the AFDC program, *Jefferson* v. *Hackney*, 406 U.S. 535, 545 [92 S.Ct. 1724, 32 L.Ed.2d 285] (1972); see also *Dandridge* v. *Williams*, 397 U.S. at 478 [90 S.Ct. 1153, 25 L.Ed.2d 491]; *King* v. *Smith*, 392 U.S. 309, 318-319 [88 S.Ct. 2128, 20 L.Ed.2d 1118] (1968), and '[s]o long as the State's

[17] For criticisms of the several pre-emptive standards in earlier cases, see Note, *Preemption as a Preferential Ground: A New Canon of Construction*, 12 Stan.L.Rev. 208 (1959); Selected Essays 1938-62, 310 (1963); and of the recent change in the Court's approach to pre-emption, see Note, *The Preemption Doctrine: Shifting Perspectives on Federalism and the Burger Court*, 75 Colum.L.Rev. 623 (1975).

> actions are not in violation of any specific provision of the Constitution or the Social Security Act,' the courts may not void them. *Jefferson*, *supra*, at 541 [at 1729 of 92 S.Ct.] Conflicts, to merit judicial rather than co-operative federal-state resolution, should be of substance and not merely trivial or insubstantial. But if there is a conflict of substance as to eligibility provisions, the federal law of course must control. *King* v. *Smith*, *supra*; *Townsend* v. *Swank*, 404 U.S. 282 [92 S.Ct. 502, 30 L.Ed.2d 448] (1971); *Carleson* v. *Remillard*, 406 U.S. 598 [92 S.Ct. 1932, 32 L.Ed.2d 352] (1972)."

413 U.S. at 423 n. 29, 93 S.Ct. at 2518.[18]

The new amendments outlined above require that the eligibility of an unwed mother be determined solely under standards to be established by HEW, pursuant to the provisions of the Social Security Act. Close attention was paid by Congress to the interests of the children in requiring their unwed mothers to cooperate in establishing the parental obligations of their fathers. It is not until *after* a member of the plaintiff mothers' class is found not to have "good cause for refusing to cooperate," under "standards that take into consideration the best interests of the child on whose behalf aid is claimed," that the defendant Commissioner may resort to the ancillary remedy available under the state statute. Leaving this determination to state administration of an AFDC program is in accord with tradition; HEW has never had direct contact with applicants for assistance. In view of the establishment of such safeguards of the child's best interests, the state law, which comes into play only after the defendant Commissioner

[18] In determining whether a substantial conflict exists between state and federal statutes, the court must construe both as narrowly as the language and legislative history permit. Only after first attempting to reconcile the statutes may the court find a conflict and thus avoid ruling on a substantive constitutional claim. *Cf. National Ass'n of Regulatory Util. Comm'rs* v. *Coleman*, 399 F. Supp. 1275, 1278 (M.D.Pa.1975).

has complied with the provisions of the Social Security Act, can hardly be regarded as frustrating any part of the purpose of the federal legislation. On the contrary, it strengthens it.

Where the federal policy favoring disclosure of the name of the father is as strongly manifested as here, it stands logic on its head to argue that Connecticut's statute is in conflict with that policy.[19] Indeed, the whole of the new Part D would be nothing but an exercise in futility if the putative father should never be identified. The ancillary remedial process afforded by § 52-440b, which is specifically designed to obtain the name of the father, builds upon a legal obligation established by the state; it supplements, but does not alter or supplant, the federal law. Rather than being inconsistent with Part D it may often be the *sine qua non* for any use at all of Part D. There is no reason why the State of Connecticut "might not properly beget a more serious penalty, if the [Connecticut] legislature deemed it wise." *California* v. *Zook*, 336 U.S. 725, 736, 69 S.Ct. 841, 846, 93 L.Ed. 1005 (1949). Even with the use of § 52-440b there is no guarantee of a successful outcome.

[19] It is clear that prior to the enactment of Pub.L. No. 94-88, HEW saw no conflict between the requirement in § 52-440b that the mother begin a paternity action, and the federal statute as amended by Pub.L. No. 93-647.

45 C.F.R. § 232.11 (1975), which deals with the duty of the applicant to assign any rights of support, states:

> "(c) If there is a failure to execute an assignment pursuant to this section, the State may attempt to establish paternity and collect child support pursuant to appropriate State statutes and regulations."

Pub.L. No. 94-88 (August 9, 1975) deals with the duty to cooperate in obtaining support, a somewhat more onerous burden than simply assigning rights to support, but a duty which is also enforced in Connecticut under § 52 440b. Since we interpret this amendment to require the Commissioner to make the determination concerning the best interests of the child before he institutes contempt proceedings, the amendment itself adds nothing to the pre-emption argument. If the Commissioner finds that instituting contempt proceedings against the mother is not contrary to the best interests of the child, the Congressional concern is satisfied. Furthermore, the child's interests are fully protected, since the initiation of contempt proceedings must, under the regulations, also mean that the mother has been found ineligible for assistance. 45 C.F.R. § 232.12 (1975). This in turn means that the mother has a right to a fair hearing at which the Commissioner's determination can be reviewed. *Goldberg* v. *Kelly*, 397 U.S. 254, 90 S.Ct. 1011, 25 L.Ed.2d 287 (1970). *Cf. Mathews* v. *Eldridge*, ____ U.S. ____, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976).

[18] Applying the foregoing principles, our conclusion is that no sufficient ground appears for denying validity to the Connecticut statute under the doctrine of pre-emption, once the Commissioner has made the required determination regarding the best interests of the child. The statute does not cover the same ground as the new Part D of the Social Security Act and is not in conflict with it. Because we hold that the state statute is not incompatible, and is therefore not pre-empted by the federal statute, we must now consider the constitutional questions which the plaintiffs have presented.

III. The Constitutional Issues

The plaintiffs renew the argument that to subject an unwed mother to the sanctions of the statute must be so contrary to the best interests of her child that § 52-440b cannot be constitutionally applied under any circumstances.

We have previously dealt with the claims of both the mothers and their children that the state statute challenged in this action violates their substantive constitutional rights. In denying those claims, each of the theories advanced by the plaintiffs were discussed at length and no useful purpose would be served by repetition here. We adhere to the conclusions reached in our former opinion.

IV. Modification of Prior Opinion

[19, 20] The supremacy of federal law does come into play in this case in one respect. Although § 52-440b can stand unimpaired, the defendant's right to resort to its use must now be conditioned upon his prior compliance with conditions which did not previously exist. The new amendments to the Social Security Act require that the defendant Com-

missioner may not find an unwed mother who refuses to cooperate in establishing the paternity of her child born out of wedlock ineligible for benefits until he first determines that she does not have good cause for refusing to cooperate, under standards which take into account the best interests of the child.[20] Compliance with these requirements does not jeopardize any legitimate interest in federalism. The defendants are required to comply with such regulations as the Secretary of HEW shall issue (including the right to a fair hearing) before continuing with the contempt proceedings against these plaintiffs. This is so even though the proceedings were commenced before the new law was enacted. *Thorpe* v. *Housing Authority*, 393 U.S. 268, 282, 89 S.Ct. 518, 21 L.Ed.2d 474 (1969). Until the defendant Commissioner has made the required determinations, continuation by him of the contempt proceedings against the plaintiffs, or removing them from the welfare rolls for their failure to "cooperate," is at the very least inappropriate. *Cf. Diffenderfer* v. *Central Baptist Church*, 404 U.S. 412, 92 S.Ct. 574, 30 L.Ed.2d 567 (1972).

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[20] It has been brought to our attention that because Pub.L. No. 94-88, § 208 (Aug. 9, 1975), requires that proposed regulations implementing the "best interests of the child" policy be presented to Congress for specific approval, HEW has taken the position that the entire amendment will not become effective until the new regulations have been approved. We do not believe that this is the proper construction of the act.

Congress has not merely put the states on notice that it intends to begin worrying about the children's interests at some time in the future. Rather, it has expressed a strong desire that the cooperation requirements of Pub.L. No. 93-647 not be enforced in a manner contrary to the best interests of the very children whom the AFDC program is intended to assist. Congress' interest is so keen that it has further decided to exercise close supervision over the implementing regulations.

Given this status, and comparing the interests of the various states in enforcing the cooperation requirements with the potential damage to the children-beneficieries of the program if overly harsh enforcement measures are employed against their parents, the wiser course is to require the Commissioner, if he is unable to determine without the aid of specific regulations that his proposed enforcement action is not against the best interests of the child, to postpone any enforcement until the new regulations have been issued and approved.

We therefore order that the defendant shall not remove the plaintiff mothers from the status of eligibility or begin or continue with any pending contempt proceedings against them under § 52-440b until after full compliance with the provisions of Section 402(a)(26) of the Social Security Act as amended. In all other respects, however, the relief requested by the plaintiff is denied.

SO ORDERED.

NEWMAN, District Judge (concurring in the result):

Since the Court concludes that the Commissioner's failure to make a determination as to whether disclosure of the father's identity is in the best interests of the child is inconsistent with the requirements of the Social Security Act, 42 U.S.C. § 402(a)(26)(B), the Supremacy Clause requires that the Commissioner either forego seeking compulsory disclosure or forego receipt of federal funds. See *Rosado* v. *Wyman*, 397 U.S. 397, 420, 90 S.Ct. 1207, 25 L.Ed.2d 442 (1970). It is unlikely that the Commissioner will elect to forego federal funds. In any event, he should be given an opportunity to decide whether to bring the state program into conformity with federal statutory requirements before this Court rules on whether compelled disclosure, without the statutorily required determination, encounters constitutional objections. Because I agree with the conclusion that the statutory requirement has not been met, I concur in the result, without consideration of the constitutional issues. See, generally, Soifer, *Parental Autonomy, Family Rights and the Illegitimate: A Constitutional Commentary*, 7 Conn.L.Rev. 1 (1974).

My view of the limited statutory issue before us also affects the abstention issue. If we were required to decide the constitutionality of the state contempt proceedings, we would encounter the issue of *Younger* abstention, to which the Supreme Court's remand directed our attention. But since

the statutory issue suffices for decision of the case at this point, our relief need not enjoin any state proceedings. Technically, according to *Rosado*, our relief should be a declaration and injunction barring the Commissioner from receiving federal funds until his disclosure policy is in compliance with federal statutory requirements. Such an order does not by its terms enjoin any state proceedings, and therefore should not encounter *Younger* objections. If the Commissioner chooses to withdraw his contempt applications in order to assure receipt of federal funds, *Younger* does not stand in the way of a federal court ruling that precipitates such state administrative action.

Since, thus analyzed, the abstention issue does not preclude relief, there is no reason to place any reliance on the supposed lack of capacity of the Connecticut Court of Common Pleas to adjudicate constitutional issues. See *State* v. *Muolo*, 119 Conn. 323, 176 A. 401 (1935). That decision was announced more than forty years ago in the context of the former town courts, in which judges were not required to be attorneys, and from which most appeals were taken *de novo*. Conn. Gen. Stat. §§ 51-134, 54-12 (1958). Even as to a court of such limited authority, the *Muolo* decision did not preclude it from constitutional adjudication, but simply indicated that it should take such action "only upon the clearest ground or where the rights of the litigants make it imperative that it should do so." 119 Conn. at 326, 176 A. at 403.

It is true that in some instances the Connecticut Circuit Court, which replaced the town courts, viewed *Muolo* as authority for declining to rule on constitutional issues, see decisions collected in Children's Exhibit B on Remand, and in at least one instance the appellate session of the Superior Court approved this practice. *Helm* v. *Welfare Commissioner*, 32 Conn. Sup. 595, 600, 348 A.2d 317, 37 Conn. L.J. No. 24, at 12, 14 (1975). Whether that approach of total abdication of

responsibility or even the restrictive approach of *Muolo* has continuing validity in the context of the modern Connecticut Court of Common Pleas is a highly questionable proposition. In the first place, *Muolo* itself suggested that unless constitutional adjudication were imperative, it would be better for the former town courts "to leave the decision to our higher courts, to which the matter may be brought by appeal or otherwise." 119 Conn. at 326, 176 A. at 403. Yet the Court of Common Pleas itself was one of the higher courts to which appeals from the town courts were taken. Plainly *Muolo* does not intimate any restriction on the capacity or responsibility of the Court of Common Pleas to adjudicate constitutional issues. And there is no reason to assume that the responsibility of that court has been diminished simply because the jurisdiction of the former Circuit Court has been merged with its own.

Furthermore, serious constitutional issues are posed by the suggestion that a state judge, even of a court of limited jurisdiction, can decline to adjudicate a federal constitutional or statutory question when it arises in a case properly within his jurisdiction. *Cf. Testa* v. *Katt*, 330 U.S. 386, 67 S.Ct. 810, 91 L.Ed. 967 (1947). *Mondou* v. *New York, N. H. & H. R. Co.*, 223 U.S. 1, 32 S.Ct. 169, 56 L.Ed. 327 (1912). He has taken an oath to uphold the United States Constitution, and his oath,[1] and the Supremacy Clause,[2] may well obligate him to decide federal constitutional and statutory questions properly before him. It has been held that even a state constitutional provision limiting the authority of lower state courts to decide constitutional questions cannot displace the Supremacy

---

[1] Conn.Const., Art. XI, § 1 (1965); Conn.Gen. Stat. § 1-25. The oath is itself required by the United States Constitution: ". . . all . . . judicial Officers . . . of the several States, shall be bound by Oath or Affirmation, to support this Constitution. . . ." U.S.Const., Art. VI.

[2] "This Constitution, and the laws of the United States . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding. . . ." U.S.Const., Art. VI.

Clause requirements imposed upon all state judges. *People* v. *Western Union Tel. Co.*, 70 Colo. 90, 198 P. 146 (1921).

In this litigation, I have previously expressed the view that rather sensitive constitutional adjudication will be required of State Common Pleas judges in the course of considering contempt actions to compel disclosure of the father's identity. 365 F.Supp. at 84. How that adjudication will be affected by the administrative determination now required is also a question that need not be anticipated at this point. But I place no reliance whatever on any limitation of the responsibility of a State Common Pleas judge. It will be time enough to consider that issue when a litigant can demonstrate, in a case properly within our jurisdiction, that she has been injured by the failure of a Common Pleas judge to decide an issue arising under the Constitution or laws of the United States. Until such a case arises, I prefer to think that judges of the Common Pleas Court will seriously accept and discharge the responsibilities imposed upon them by the Supremacy Clause. *See New Haven Tenants' Representative Council, Inc.* v. *Housing Authority of City of New Haven*, 390 F.Supp. 831 (D.Conn. 1975).

APPENDIX B

Judgment of the three-judge District Court below.

FILED

Jun 17 3:03 P.M. '76
U.S. DISTRICT COURT NEW HAVEN, CONN.

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

CIVIL NO. 15,579

DONNA DOE, ET AL, Individually and on behalf of all others similarly situated

v.

EDWARD MAHER, Individually and as Commissioner of Social Services of the State of Connecticut

CIVIL NO. 15,589

SHARON ROE, ET AL, Individually and on behalf of all others similarly situated

v.

EDWARD MAHER, Individually and as Commissioner of Social Services of the State of Connecticut

JUDGMENT

This case having come on for further proceedings before the Three-Judge District Court upon remand by the Supreme Court of the United States,

And the Court having filed its Memorandum of Decision, under date of June 1, 1976,

It is ORDERED, ADJUDGED and DECREED that the defendant shall not remove the plaintiff mothers from the status of eligibility or begin or continue with any pending contempt proceedings against them under § 52-440b until after full compliance with the provisions of Section 402(a)(26) of the Social Security Act as amended. In all other respects, however, the relief requested by the plaintiffs be and is hereby denied.

Dated at New Haven, Connecticut, this 17th day of June, 1976.

SYLVESTER A. MARKOWSKI,
Clerk, U.S. District Court

By: Frances J. Coneglio
Deputy in Charge

APPROVED:

WILLIAM H. TIMBERS, U.S. Circuit Judge

M. JOSEPH BLUMENFELD, U.S. District Judge

JON O. NEWMAN, U.S. District Judge

APPENDIX C

Notice of Appeal.

FILED

Jul 29 11:07 A.M. '76
U.S. DISTRICT COURT NEW HAVEN, CONN.

UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

Civil Nos. 15,579 & 15,589

July 29, 1976

DONNA DOE, ET AL, Individually
and on behalf of all others
similarly situated

SHARON ROE, ET AL, Individually
and on behalf of all others
similarly situated

v.

EDWARD MAHER, Individually and
as Commissioner of Social Services
of the State of Connecticut

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that Edward W. Maher, Commissioner of Social Services of the State of Connecticut, the defendant above named, hereby appeals to the Supreme Court of the United States from the final judgment ordering the permanent injunction enjoining the defendant from further

enforcing Index (Section) 404.6, effective November 1, 1975, of the Connecticut Department of Social Services Policy Manual entered in this action on the 17th day of June, 1976.

This appeal is taken pursuant to 28 U.S.C. § 1253.

MICHAEL ANTHONY ARCARI
Assistant Attorney General
90 Brainard Road
Hartford, Connecticut 06114
Tel. 203 - 566-7040
Attorney for Defendant

FILED

Jul 29 11:07 A.M. '76
U.S. DISTRICT COURT NEW HAVEN, CONN.

In the

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

Civil Nos. 15,579 & 15,589
DONNA DOE, ET AL, Individually
and on behalf of all others
similarly situated

SHARON ROE, ET AL, Individually
and on behalf of all others
similarly situated

v.

EDWARD MAHER, Individually and
as Commissioner of Social Services
of the State of Connecticut

CERTIFICATE OF SERVICE

I hereby certify that on this 29th day of July 1976, the defendant's notice of appeal to the United States Supreme Court in the above entitled suit was duly served by depositing the same in a United States Post Office, with first class postage prepaid, addressed to David Rosen, Esquire, 265 Church Street, New Haven, Connecticut, Frank Cochran, Esquire, Connecticut Civil Liberty Union Foundation, 57 Pratt Street, Hartford, Connecticut, Stephen Wizner, Esquire, Yale Legal Services, 127 Wall Street, New Haven, Connecticut, Douglas Crockett, Esquire, Tolland-Windham Legal Assistance Assoc.,

746 Main Street, Willimantic, Connecticut, Elliott Taubman, Esquire, New London Legal Assistance, 3-11 North Main Street, Norwich, Connecticut, and Robert Beckman, Esquire, Norwalk-Stamford and Danbury Regional Legal Services, 342 Atlantic Street, Stamford, Connecticut. I further certify that all parties required to be served have been served.

MICHAEL ANTHONY ARCARI
Assistant Attorney General
Counsel for the Defendant

90 Brainard Road
Hartford, Connecticut 06114
Tel. 203 - 566-7040

APPENDIX D

Section 404.6, effective November 1, 1975, Volume I, Chapter III, Supplement IV-D, Connecticut Department of Social Services, Public Assistance Program Manual.

Connecticut Department of Social Services
Social Service Policies — Public Assistance

Manual Vol. 1 Chapter III Supplement IV-D

CHILD SUPPORT PROGRAM

Absent Parent's Support — AFDC 404.6 - 404.7

404.6 *Responsibility for Support and Establishment of Paternity*

Information about the alleged father is obtained from the mother of the child. If he resides in the State, an interview is held to discuss the situation and to secure his Acknowledgement of Paternity.

The mother is required to name the father, by Affirmation of Paternity, under oath and to file a petition to establish paternity and support.

If the mother is unable to name the father, she is still eligible for assistance to meet her own needs, the needs of the child in question, and the needs of any other children in the family, provided all other eligibility requirements are met; however, she is informed that she is subject to be cited to appear before any judge of the Court of Common Pleas, be compelled to name the putative father and and to institute an action to establish paternity of the child.

If the mother is unwilling to name the father, she is not eligible for assistance to meet her own needs; however, her children remain eligible for assistance. In this case also the mother is informed that she will be cited to appear before any judge of the Court of Common Pleas and be compelled to name the putative father. An action to establish paternity of the child will be instituted by the Child Support Unit.

404.7 *Legal Determination of Paternity*

Paternity proceedings are initiated in the Court of Common Pleas in the case of each out-of-wedlock child for whom the Department has been unsuccessful in securing a written acknowledgement of paternity and the mother has named the father. Statements made by the mother substantiate a likelihood of establishing paternity when the putative father is residing in the State.

APPENDIX E

Section 52-440b of the General Statutes of Connecticut.

SEC. 52-440b. *Compelling disclosure of name of putative father. Institution of action.* (a) If the mother of any child born out of wedlock, or the mother of any child born to any married woman during marriage which child shall be found not to be issue of the marriage terminated by a decree of divorce or dissolution or by decree of any court of competent jurisdiction, fails or refuses to disclose the name of the putative father of such child under oath to the welfare commissioner, if such child is a recipient of public assistance, or to a selectman of a town in which such child resides, if such child is a recipient of general assistance, or otherwise to a guardian or a guardian ad litem of such child, such mother may be cited to appear before any judge of the court of common pleas and compelled to disclose the name of the putative father under oath and to institute an action to establish the paternity of said child.

(b) Any woman who, having been cited to appear before a judge of the court of common pleas pursuant to subsection (a), fails to appear or fails to disclose or fails to prosecute a paternity action may be found to be in contempt of said court and may be fined not more than two hundred dollars or imprisoned not more than one year or both.

APPENDIX F

Departmental Letters.

UNITED STATES GOVERNMENT

MEMORANDUM

TO: Elmer W. Smith
Acting Regional Director, OCSE

FROM: Acting Director
Office of Child Support Enforcement

SUBJECT: Section 208 of P.L. 94-88

RECEIVED
Apr. 6, 1976
PROGRAM OPERATIONS

DATE: Nov. 21, 1975

This is in reply to your memorandum of October 10 in which you raised two questions concerning approval of the IV-D plan. Your questions, and our responses thereto, are as follows:

1. Under the authority of P.L. 94-88, Section 208, New Jersey has included a statement that it will not be necessary to establish paternity if it will result in family discord, or deprivation to legitimate children or be harmful to a new family. In the absence of standards prescribed by the Secretary (which are called for by the statute), New Jersey insists that we would be unjustified in refusing to approve its plan containing this language. Yet the New Jersey plan

language appears to be much broader than the statute contemplates and probably much broader than the Department's regulations (when promulgated) would find acceptable. What is your recommendation for dealing with this issue?

Section 208 of P.L. 94-88 is not a self-implementing statute. We have been advised by the Office of the General Counsel that when a statute contains no clear substantive provisions, but rather requires the Department or Secretary to issue standards or regulations, States should not amend their plans until such time as the Department promulgates such standards or recommendations. Therefore, State IV-D plans should not be approved if they contain "ad hoc" State-devised provisions relating to section 208 of P.L. 94-88.

Regulations are currently being developed which will implement both the IV-A and IV-D provisions of section 208. In the interim, States have at their disposal the provisions of 45 CFR 303.5 (b), which specify that the IV-D agency need not attempt to establish paternity in cases involving incest, forcible rape, or adoption, if it would not be in the best interests of the child. In addition, we would hope that the IV-D agency would, regardless of the provisions of P.L. 94-88, utilize care and common sense in administering its program so that children and their custodial parents or caretaker relatives will not be harmed by the support enforcement process.

2. The IV-D preprint contains a provision for making information available to public officials. However, section 402 (a) (9) of the Act

relating to safeguarding of information was amended by P.L. 94-88 to repeal the public official provision. How should this be handled?

Section 402 (a) (9) does not apply to safeguarding of information in the IV-D program. However, since the IV-A and IV-D programs are so closely related and serve so much of the same population, it was determined to be desirable to extend the same safeguards to the IV-D program that are applicable to the IV-A program, by virtue of authority granted by sections 452 (a) (1) and 454 (13) of the Act.

The problem which you raise has now been resolved by the promulgation of 45 CFR 302.18, effective August 1, 1975. The amendment to the IV-D preprint was issued by OCSE-AT-75-9. An advance copy is attached for your information. The Department's regulations now conform with the provisions of 402 (a) (9) as amended by P.L. 94-88.

JOHN A. SVAHN

Attachment

DEPARTMENT OF HEALTH, EDUCATION,
AND WELFARE
REGION I
JOHN F. KENNEDY FEDERAL BUILDING
GOVERNMENT CENTER
BOSTON, MASSACHUSETTS 02203

Office Of Child Support Enforcement

July 30, 1976

In reply refer to: OCSE

RECEIVED
Aug. 12, 1976
PROGRAM OPERATIONS

Mr. Vincent Capuano
Chief of Eligibility Services
Connecticut Department of Social Services
110 Bartholomew Avenue
Hartford, Connecticut 06105

Dear Mr. Capuano:

Re: *Doe et al.* v. *Maher*

In response to your July 12, 1976 letter requesting a legal opinion; on *Doe et al.* v. *Maher,* our regional attorney has consulted with the Office of General Counsel in Washington and has forwarded to us the following statement:

"We are informed that this decision of the District Court is consistent with the position taken by HEW pending the issuance of regulations to implement Public Law 94-88, and that Footnote 20 of the Court's opinion somewhat

misconstrues the HEW position. It is true that Section 208 of Public Law 94-88 is not a self-implementing statute, but rather requires the Secretary to issue standards or regulations for a State's determination that a mother has good cause for refusing to cooperate in establishing paternity (which standards shall take into account the best interests of the child on whose behalf aid is claimed). Until these regulations are issued by HEW, States may not amend their State plans to implement the statute; and State IV-D plans will not be approved by HEW if they contain "ad hoc" State-devised provisions relating to Section 208 of Public Law 94-88. However, in the interim, States have at their disposal the previously-issued HEW regulations at 45 C.F.R. 303.5(b), which specify that the IV-D agency need not attempt to establish paternity "in any case involving incest or forcible rape, or in any case in which legal proceedings for adoption are pending, if, in the opinion of the IV-D agency, it would not be in the best interests of the child to establish paternity." In addition, HEW has indicated that IV-D agencies, on a case by case basis, should utilize care and common sense in administering the program so that children and their custodial parents or caretaker relatives will not be harmed as a result of their cooperating with the State in establishing paternity or obtaining support. This position of HEW, encouraging individualized determinations of whether a mother has good cause (with consideration of her child's best interests) for not cooperating in establishing paternity, would seem to accord with the holding of the Federal District Court that the defendant Commissioner should make a determination that his enforcement action against plaintiffs is not against the best interests of their children. We also are informed that

HEW will not penalize States for a good faith effort to ascertain on a case by case basis whether cooperation in establishing paternity would not be in the child's best interests."

Sincerely,

CHARLES C. GENTILE
NEIL P. FALLON
Acting Regional Director

APPENDIX G

Section 404.6, Volume I, Chapter III, Supplement IV-D, Connecticut Department of Social Services, Public Assistance Manual (presently in effect).

Connecticut Department of Social Services
Social Service Policies — Public Assistance
Manual Vol. I Chapter III Supplement IV-D

CHILD SUPPORT PROGRAM

Absent Parent's Support — AFDC 404.6 - 404.7

404.6 *Responsibility for Support and Establishment of Paternity:*

Information about the alleged father is obtained from the mother of the child. If he resides in the State, an interview is held to discuss the situation and to secure his Acknowledgement of Paternity.

If the mother is able and willing to name the father, she is to do so by Affirmation of Paternity, under oath and to file a petition to establish paternity and support. If the mother is unable to name the father, she is still eligible for assistance to meet her own needs, the needs of the child in question, and the needs of any other children in the family, provided all other eligibility requirements are met; however, she is informed that she is subject to be cited to appear before any judge of the Court of Common Pleas, be compelled to name the putative father and to institute an action to establish paternity of the child.

If the mother is unwilling to name the father, she and her children remain eligible for assistance, pursuant to the provisions of the ruling in DONNA DOE, et al, v. EDWARD MAHER which states that the Commissioner of Social Services may not find an unwed mother who refuses to cooperate in establishing the paternity of her child born out-of-wedlock ineligible for benefits until he first determines that she does not have good cause for refusing to cooperate, under standards which take into account the best interests of the child. Such standards, to be established by H.E.W. regulations, are in the process of promulgation by the H.E.W. Secretary. Pending the establishment of the aforesaid standards, a tickler will be issued by the support worker to review the case when policy is issued.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

No. 76-678

EDWARD W. MAHER, Commissioner of Social Services of the State of Connecticut

Appellant,

v.

DONNA DOE, ET AL

Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF CONNECTICUT

MOTION TO PROCEED IN FORMA PAUPERIS

Plaintiff-appellee children respectfully request leave, pursuant to Title 28 U.S.C. §1915 and Rule 53 of the Rules of this Court, to proceed in forma pauperis in defending this appeal. In support of this motion the children rely on the affidavits filed in support of their mother's applications to proceed in forma pauperis, filed herewith.

PLAINTIFF-APPELLEE CHILDREN

BY _____

David N. Rosen
Edward J. Dolan
265 Church Street
New Haven, Connecticut 06510
787-3513

Their Attorneys

ROSEN, DOLAN & KOSKOFF
ATTORNEYS AT LAW
265 CHURCH STREET
NEW HAVEN, CONN. 06510
787-3513

CERTIFICATION

This is to certify that a copy of the foregoing Motion to Proceed In Forma Pauperis was mailed first class mail postage prepaid this 23rd day of December, 1976, to:

Frank Cochran, Esq.
57 Pratt Street
Hartford, Connecticut

Michael Anthony Arcari
Assistant Attorney General
90 Brainard Road
Hartford, Connecticut 06114

David N. Rosen

ROSEN, DOLAN
& KOSKOFF
ATTORNEYS AT LAW
[illegible]

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

76-878

EDWARD MAHER, Individually and as Commissioner of Social Services of the State of Connecticut

Defendant-Appellant

V.

DONNA DOE, ET AL., Individually and on behalf of all others similarly situated

SHARON ROE, ET AL., Individually and on behalf of all others similarly situated

Plaintiffs-Appellees

+ + + + + + +

APPELLEE MOTHERS' AND CHILDREN'S MOTION TO DISMISS OR AFFIRM.

Frank Cochran
Connecticut Civil Liberties Union Foundation, Inc.
57 Pratt Street
Hartford, Connecticut 06103
(203) 247-9823
Attorney for Appellee Mothers

David Rosen
Rosen, Dolan and Koskoff
265 Church Street
New Haven, Connecticut 06510
(203) 787-3153
Attorney for Appellee Children

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

DONNA DOE, ET AL., Individually and on behalf of all others similarly situated

SHARON ROE, ET AL., Individually and on behalf of all others similarly situated

V.

EDWARD MAHER, Individually and as Commissioner of Social Services of the State of Connecticut

++++++

APPELLEE MOTHERS' AND CHILDREN'S MOTION TO DISMISS OR AFFIRM

The classes of appellee mothers and appellee children, pursuant to Rule 16 of the Supreme Court of the United States, move to Dismiss the Appeal and/or to Affirm the Judgment below on the grounds that this Court lacks jurisdiction over this appeal, and that the appeal presents no substantial question warranting plenary consideration by this Court.

INDEX

TABLE OF AUTHORITIES

CASES

STATUTES AND RULES

PROPOSED REGULATIONS

OTHER PUBLICATIONS

OPINION BELOW

The opinion of the District Court which accompanied the limited injunction from which this appeal has been taken is reported at 414 F Supp 1368. Earlier opinion in this action are reported at 356 F Supp 202 (1973) (sub nom Doe v Norton, (denying preliminary relief), 365 F Supp 65 (1973)(Ibid, denying permanent injunctive and declaratory relief), 415 US 912 (1974) (sub nom Roe v. Norton noting probable jurisdiction), and 422 US 391 (1975) (sub nom Roe v. Norton, vacating and remanding.

JURISDICTION

Appellee mothers, plaintiffs below, brought this action under the civil rights act, 42 U.S.C. Section 1983, jurisdiction being predicated on 28 U.S.C. Section 1343(3), and the declaratory judgment act 28 U.S.C Section 2201. The District Court assumed jurisdiction under these statutes, convened a three-judge court pursuant to 28 U.S.C. 2281 and 2284.

After remand by this Court the District Court permitted intervention by fresh plaintiffs on the same jurisdictional bases and entered injunctive relief. The repeal of Section 2281 does not affect this appeal; P.L.94-381, Section 7.

Appellant bases his appeal on the direct appeal statute, 28 U.S.C. Section 1253. Appellee mothers submit, and argue further below, that the direct appeal statute does not apply here because the appellant does not request reversal of any order based on the adjudication of the constitutional merits of the action within the meaning of MTM v. Baxley, 420 US 799 (1975), and that one of the questions sought to be decided on this appeal is premature in that it is raised only by post-judgment motion, presently pending in the District Court.

QUESTIONS PRESENTED

1. Whether this Court has jurisdiction under 28 U.S.C. Section 1253 to hear this appeal.

2. Whether there is a substantial question warranting plenary review as to whether the District Court's order, enjoining the appellant Commissioner of Social Services from terminating assistance or referring for contempt of court proceedings mothers of illegitimate children who are unwilling or unable to comply with a demand that they disclose the names of their children's fathers and/or prosecute paternity actions, without first affording an appropriate hearing to determine whether such action is consistent with the child's best interests as defined by mandated but not-yet-promulgated federal and state regulations, was in excess of its equitable discretion.

STATUTES INVOLVED

Connecticut General Statutes Section 52-440b:

> "(a) If the mother of any child born out of wedlock, or the mother of any child born to any married woman during marriage which child shall be found not to be issue of the marriage terminated by a decree of divorce or dissolution or by decree of any court of competent jurisdiction, fails or refuses to disclose the name of the putative father of such child under oath to the welfare commissioner, if such child is a recipient of public assistance, or to a selectman of a town in which such child resides, if such child is a recipient of general assistance, or otherwise to a guardian or a guardian ad litem of such child, such mother may be cited to appear before any judge of the court of common pleas (assigned to a geographical area) and compelled to disclose the name of the putative father under oath and to institute an action to establish the paternity of said child.
>
> "(b) Any woman who, having been cited to appear before a judge of the court of common pleas pursuant to subsection (a), fails to appear or fails to disclose or fails to prosecute a paternity action may be found to be in contempt of said court and may be fined not more than two hundred dollars or imprisoned not more than one year or both."

Title 42 U.S.C 602(a)(26) and (27) (as amended by P.L. 93-647, 94-46 and 94-88):

Section 402(a):

> "A state plan for aid and services to needy families with children must....

"(26) provide that, as a condition of eligibility for aid, each applicant or recipient will be required--

"....

"(B) to cooperate with the State (i) in establishing the paternity of a child born out of wedlock with respect to whom aid is claimed, and (ii) in obtaining support payments for such applicant and for a child with respect to whom such aid is claimed, or in obtaining any other payments or property due such applicant or such child, (unless (in either case) such applicant or recipient is found to have good cause for refusing to cooperate as determined by the State agency in accordance with standards prescribed by the Secretary, which standards shall take into consideration the best interests of the child on whose behalf the aid is claimed;) and that, if the relative with whom a child is living is found to be ineligible because of failure to comply with the requirements of subparagraphs (A) and (B) of this paragraph, any aid for which such child is eligible will be provided in the form of protective payments as described in section 406(b)(2) (without regard to subparagraphs (A) through (E) of such section;

"(27) provide, that the State has in effect a plan approved under part D and operates a child support program in conformity with such plan."

STATEMENT OF THE CASE

Connecticut General Statutes Section 52-440b requires each mother of illegitimate children to disclose the name of her child's father and prosecute a paternity action against him whether, in her opinion, such action is desirable or not. Mothers on welfare and mothers whose children have guardians other than themselves may be subjected to contempt proceedings in the court of common pleas if they refuse to comply, and they face up to a year in jail if found in contempt.

The plaintiff classes of mothers commenced two actions in early 1973, challenging C.G.S. Section 52-440b as violating their contitutional rights to privacy, due process and equal protection and as contravening applicable sections of the Social Security Act. Some of the mothers had been threatened with contempt citations, others had received them.

The District Court for the District of Connecticut denied preliminary relief in one action, Doe v Norton 356 F Supp 202, convened a three-judge court, appointed separate counsel to represent the children, and consolidated the two actions. After a hearing on the merits, the District Court certified them as class actions and upheld the statute on the merits, 365 F Supp 65 (1973). Plaintiffs appealed. This Court noted probable jurisdiction Roe v Norton, 415 US 912 (1974), heard oral argument 43 LW 3469 (1975) and vacated the District Court's judgment, remanding for further consideration of two questions:

> ...further consideration in light of Pub L. 93-647, and, if a relevant state criminal proceeding is pending, also for further consideration in light of Younger v Harris 401 US 37 (1971) and Huffman v Pursue 420 US 592 (1975),422 US at 393.

Before the District Court acted on remand, the Social Security Act was amended again, and it now provides that states must terminate AFDC payments to parents who refuse to cooperate with the state in securing support from legally liable relatives

> unless...such applicant or recipient is found to have good cause for refusing to cooperate as determined by the State agency in accordance with standards prescribed by the Secretary, which standards shall take into consideration the best interests of the child on whose behalf aid is claimed;....42 U.S.C. Section 602(a)(26)

The Secretary of Health, Education and Welfare is required to promulgate new standards for determining the child's best interests subject to Congressional approval, but to date he has not done so. Section 402(a)(26) is mandatory, not permissive, and neither it nor any other provision of the federal law recognizes Connecticut's statutory civil contempt procedure.

The three-judge District Court held a hearing on remand, permitted intervention of fresh parties and, on June 1, 1976, issued an opinion, reported sub nom Doe v. Maher at 414 F Supp 1368 (with District Judge Newman concurring). The District Court

redesignated two subclasses of mothers: 1) those who had been served with contempt citations, and 2) those who were threatened with such citation. The court held that comity did not require dismissal as to either subclass, 414 F Supp 1374-1377, but enjoined enforcement of both C.G.S. Section 52-440b (civil contempt sanction), and Welfare Supplement IV-D (termination of benefits sanction)"until after full compliance with the provisions of Section 402 (a)(26) of the Social Security Act as amended" 414 F Supp at 1382. The required compliance was defined to include following "such regulations as the Secretary of HEW shall issue (including the right to a fair hearing)" 414 F Supp at 1381-2.[1]

As the Congressionally mandated federal regulations have not been issued the District Court's injunction is in full effect.

The evidence before the District Court consisted largely of transcripts of hearings held under Section 52-440b in the Courts of Common Pleas, and affidavits from members of the subclasses of plaintiff mothers. Depositions of experts were introduced by counsel for the plaintiff-appellee children. The record also contains evidence of the administrative practice under Section 52-440b and bulky administrative policies, of which Section 404.6, (Appendix D to the Jurisdictional Statement) is only one of the relevant provisions.

The defendant Commissioner of Social Services has now appealed and in his jurisdictional statement appears to raise two contentions: 1) that federal regulations 45 CFR 303.5, remains the federally mandated standard for determination of those cases in which the mother claims that a refusal to cooperate is justified by her child's best interests despite the passage of P. L. 94-88,

1/ In dictum a majority of the District Court reiterated its opinion that the statute was facially constitutional, while concurring. Judge Newman noted that the constitutional issues were not reached.

Section 208 of which mandates new regulations defining such standards and procedures, and 2) that the injunction issued was too broad in light of applicable federal statutes and assertedly operative federal regulations, because it required a fair hearing and determination of good cause prior to action under Section 52-440b in the case of those mothers who are unable to name their children's fathers as well as in the cases of those unwilling to do so.[2]

I. THE APPEAL SHOULD BE DISMISSED BECAUSE APPEAL FROM THE ORDER BELOW DOES NOT LIE TO THIS COURT

A. A Three-Judge Court was Not Required to Hear the Issues on Remand

The Supreme Court has jurisdiction on direct appeal under 28 U.S.C. Section 1253 when an injunction has been granted or denied "in any civil action, suit or proceeding required by any Act of Congress to be heard and determined by a district court of three judges." Only a three-judge court could, on June 1, 1976 enjoin "the enforcement, operation or execution of any State statute...upon the ground of the unconstitutionality of such statute..." 28 U.S.C. Section 2281. The general rule, stated in MTM v. Baxley, 420 U.S. 799 (1975), is that

> "a direct appeal will lie to this Court under Section 1253 from the order of a three-judge federal court denying interlocutory or permanent injunctive relief only where such order rests upon resolution of the merits of the constitutional claim presented below." Id., at 804

The order at issue in this case could have been made by a single judge. A three-judge court is not required to enjoin enforcement of a state law that conflicts with a federal statute and is thus

2/ Appellant has thus abandoned any claim that the District Court misapplied the comity doctrine in reaching the merits of this case or that no injunction should have issued. He claims only that the injunction which did issue was too broad.

void under the supremacy clause. This is so even though the complaint also demands relief on constitutional grounds. Burns v. Acala, 420 US 575 (1975); Shea v Vialpando, 416 US 251,258 (1974); Hagansv. Lavine, 415 US 528, 544 (1974); Rosado v. Wyman, 397 US 397 (1970); Swift & Co. v. Wickham, 382 US 111 (1965). The determination that federal relief is not barred by principles of comity is also within the purview of the single judge when it is preliminary to a nonconstitutional holding.

B. No Exceptional Circumstances Justifying Direct Appeal from an Order Not Required to be Issued by Three Judges are Present in This Case

The Court has heard appeals under Section 1253 in some circumstances in which the three-judge court has been properly convened to consider constitutional issues but issued an injunction on statutory grounds alone. The special circumstances justifying an exception from the general rule of Baxley are not present here. In Engineers v. Chicago, R. I. & P. R. Co., 382 US 423 (1966) a three-judge court was convened to hear a constitutional challenge to Arkansas's full-crew laws on the ground that they burdened interstate commerce; but the laws were enjoined on congressional pre-emption grounds. This court heard a direct appeal under Section 1253; but, in contrast to this case the District Court, acting before Swift and Hagans,was un-instructed about the preferability of resolution of the statutory issues by a single judge. Three-judge court determination of the statutory issue and appeal under Section 1253 to this Court were at that time appropriate accommodations of the interests protected by the three-judge court act and considerations of judicial economy. See Phillips v. United States, 312 US 246 (1941).

3/ Moreover, Engineers followed closely after Swift and the Court's jurisdictional discussion may have been designed in part to avoid an otherwise unnecessary series of manuvers to bring the case before the court of appeals, where no actual judicial economy was involved.

In Philbrook v. Glodgett, 421 US 707 (1975) the Court stressed the presence of exceptional circumstances justifying the convening of a three-judge court below and entertained a direct appeal from an injunction issued on supremacy clause grounds. The Court pointed out that although

> "it was the preferrad practice for a single judge when presented with both statutory and constitutional grounds for decision, to resolve the statutory claim before convening a three-judge court (, T)he District Court in this case was unable to proceed in that manner because appellees raised only constitutional contentions in their complaint,... and raised their statutory contention, for the first time, at oral argument before the three-judge court." 421 U.S. at 712 n. 8.

There are no similar exceptional circumstances justifying departure from Hagans and Baxley present in this case. Consideration on remand should have been by a single judge because the mandate of this Court specifically directed reconsideration in light of single-judge issues. See Youakim v. Miller, ___ US___, 96 S. Ct. 1399 (1976). Under these circumstances, the unnecessary expenditure of judicial resources at the district court level does not justify the additional extraordinary process of direct appeal.

C. Dismissal of this Appeal is Consonant with the Purposes of the Three-Judge Court Act

Direct appeal of this order does not further the historical purpose of Section 1253. This Court recently noted that

> "Congress established the three-judge court apparatus for one reason: to save state and federal statutes from improvident doom, on constitutional grounds, at the hands of a single federal judge." Gonzalez v. Automatic Employees Credit Union, 419 US 90, 97 (1974).

In holding that Section 1253 must be narrowly construed so as to limit the use of the three-judge court mechanism to situations implicating that purpose, the Court applied the rationale of Phillips v. United States, supra:

> It is a matter of history that this procedural device was a means of protecting the increasing body of state legislation regulating economic enterprise from invalidation by a conven-

> tional suit in equity. While Congress thus sought to assure more weight and greater deliberation by not leaving the fate of such litigation in the hands of a single judge, it was no less mindful that the requirement of three judges...entails a serious drain upon the judicial system...Moreover, inasmuch as this procedure also brings direct review of a district court to this Court, any loose construction of the requirements of Section 2281 would defeat the purposes of the Congress, as expressed by the Jurisdictional Act of February 13, 1925, to keep within narrow confines our appellate docket. Id., at 250. (Emphasis added.)

Narrow construction of the three-judge court provisions, including Section 1253, is peculiarly appropriate when the operation of state law is enjoined simply because it conflicts with a federal statute. In a statutory case there is no danger that a lower court has misused the delicate tool of Constitutional judicial review; and any errors it makes are subject to legislative as well as appellate correction. See Swift v. Wickham, supra, 382 US at 127-128.

Congress has approved this policy of restrained review by eliminating three-judge courts and direct appeals therefrom in injunctive suits challenging the validity of state statutes on constitutional grounds. ___Stat.___, P.L. 94-381. (1976).

By its 1975 remand of this case for decision on statutory rather than constitutional grounds, this Court acted to insure the least possible intrusion into the legislative sphere.

Therefore, "the coincidence of a constitutional and statutory claim should not automatically require a single judge to defer to a three-judge panel" (Hagans v. Lavine, supra, 415 US 544) nor compel this Court to consider an appeal under Section 1253. The appeal should be dismissed.

II. THE INJUNCTION BELOW WAS AN APPROPRIATE EXERCISE OF THE DISTRICT COURT'S EQUITABLE POWERS

The District Court, finding a question of federal supremacy in the enforcement of C.G.S. Section 52-440b and the Connecticut "IV-D" program, enjoined both terminations of assistance and citations for contempt under Section 440b "until after full compliance with the provisions of Section 402 (2)(26)... as amended" (414 F Supp at 1382). The Court justified this injunction by finding:

> The defendants are required to comply with such regulations as the Secretary of HEW shall issue (including the right to a fair hearing) before continuing with the contempt proceedings against these plaintiffs..Until the defendant Commissioner has made the required determinations, continuation by him of the contempt proceedings against the plaintiffs, or removing them from the welfare rolls for their failure to "cooperate," is at the very least inappropriate. (Ibid 1381-2).

Although to date no final federal or state regulations have been published, the Secretary of HEW has published proposed regulations and received comments on them.

The appellant Commissioner does not in his Jurisdictional Statement attack the District Court's application of the supremacy clause, nor does he argue that no injunction was appropriate to enforce the applicable federal statute. Rather he seems to think that the injunction was too broad, or possibly ill-timed. Although his claims are less than clear, he appears to want to enforce a very narrow definition of the child's best interests until HEW promulgates a new and broader one.

It is axiomatic that a federal District Court, faced with a violation of applicable law by a public body, has substantial latitude in determining both the scope and timing of relief Rosado v. Wyman, 397 US at 397 (1970), Brown v. Board of Education, 349 US 294,300. See also Mills v. Gautreaux, ___US___ 47 LE2d 792 (1976), Reynolds v. Sims 377 US 533, Ely v. Klahr 403 US 108 (1972) and United States v. W.T. Grant Co., 345 US 629 ( ).

This Connecticut statute has been the subject of protracted litigation, and the public policies in question have been the subject of heated dispute within all three branches of government for at least eight years. See, e.g. Doe v. Shapiro 302 F Supp 761 app dis'd 396 US 488, Lascaris v. Shirley 420 US 730 (1975), P. L. 93-647 (and Leg. Hist.), P. L. 94-46, P. L. 94-88 (and Leg. Hist.) and 41 Fed Reg. 34296-34301 (August 13, 1976) (proposed regulations).

The record in this case is replete with the type of abuses which Congress has sought to prevent in mandating a substantial qualification on the mother's duty to "cooperate" where she has good cause considering inter alia the child's best interest, for refusing to do so. This Court agreed that the constitutional questions presented by the Connecticut statute were substantial in noting jurisdiction and hearing full argument Roe v. Norton 415 US 912 (1974). And see Soifer, "Parental Autonomy, Family Rights and the Illegitimate: A Constitutional Commentary" 7 Conn.L.Rev 1 (1974).

It was precisely because, as concurring Judge Newman found "rather sensitive constitutional adjudication will be required of State Common Pleas judges in the course of considering contempt actions to compel disclosure of the father's identity" 414 F Supp at 1383, citing 365 F Supp at 84, that clear and constitutional standards should be developed before the state attempts to enforce the "cooperation" either by cutting recipients off from welfare or finding them in contempt of court. See Vol. II, Weekly Compilation of Presidential Docs. No. 2 p 20,(1975) and H. Rept. 94-368, pp 8-12 (August, 1975). And see Cleveland Board of Education v. LaFleur 414 US 632 (1974), Pierce v. Society of Sisters 268 US 510, Stanley v. Illinois 405 US 645 (1972), and Roe v. Wade 410 US 113 (1973). Were this Court to reverse the District Court's relief it would then confront constitutional questions which are manifestly substantial. It would, of course, be premature to consider the constitutional questions in the present posture of the case.

The District Court's injunction is even more clearly equitable in light of a change in Connecticut law that went into effect the day after the court issued its opinion. Connecticut has amended its statutory public assistance provisions to incorporate a good cause exception similar to the Social Security Act. Public Act 76-334 provides, in part that

> All information required to be provided to the commissioner as a condition of such eligibility under federal law shall be so provided by the supervising relative, provided, no person shall be determined to be ineligible if the supervising relative has good cause for the refusal to provide information concerning the absent parent or if the provision of such information would be against the best interests of the dependent child or children, or any of them. The commissioner of social services shall adopt by regulation, in accordance with subsection (b) of section 4-168, standards as to good cause and best interests of the child. Any person aggrieved by a decision of the commissioner as to the determination of good cause or the best interests of such child or children may request a fair hearing in accordance with the provisions of sections 17-2a and 17-2b.

The commissioner has promulgated no regulations in the more than six months P.A. 334 has been in effect. He therefore has no procedures or standards for enforcement of the cooperation requirement or Section 52-440b to propose to the District Court of this Court. The District Court concluded that

> "the wiser course is to require the Commissioner, if he is unable to determine without the aid of specific regulations that his proposed enforcement action is not against the best interests of the child, to postpone any enforcement until the new regulations have been issued and approved." 414 F Supp at 1381,n.20.

Connecticut apparently agrees that standardless enforcement is inappropriate, and has required the Commissioner to promulgate regulations defining the good cause exception. The Commissioner has not done so. In these circumstances it is surely equitable for the Commissioner to be restrained from standardless enforcement in violation of the intent of federal and state law. Moreover, if promulgation of regulations by the Commissioner or other circumstances should render the District Court's injunction inequitable, the opinion of the District

Court permits the Commissioner to apply there for a modification of the injunction. Instead the Commissioner has already done so with respect to mothers unable to provide the information he requires.[4] In these circumstances, where the Commissioner has declined either to comply with state law by promulgating regulations or to present those regulations or other standards to the District Court in a request for modification of the Court's injunction, the injunction is clearly equitable and it would be premature for this Court to intervene.

The District Court was acting well within its power in ordering that the Connecticut "cooperation" program not result in termination of benefits or incarceration, at least until the administrative and legislative tanges concerning the child's best interests are resolved.

III. THE FEDERAL "COOPERATION" REQUIREMENT HAS NOT YET GONE INTO EFFECT

Although the injunction issued by the District Court in this case rests on general equitable principles, it is also supportable on the ground that the "cooperation" requirement of the Social Security Act will not go into effect until the "good cause" regulations underlying it are promulgated by the Secretary and approved by the Congress, as required by the Social Security Act Amendments.

Nonetheless, it is wrong. The mother of an illegitimate child could never be required to disclose the father's name as a condition of receiving AFDC benefits for her child or herself before the effective date of P.L.93-647,

4/ When and if heard and determined, an appeal dealing with this issue could be prosecuted System Federation v. Wright, 364 US 642 (1961), Pasadena City Board of Education v. Spangler, ___ US ___ 49 LEd2d 599 (1976). If there is a change of circumstances, such as HEW recognition of the peculiar categories the appellant utilizes, the Court would have power to modify its injunction subject to appropriate reveiw at that time. At present though, appellant argues on distinctions which have never been presented to the District Court.

Lascaris v. Shirley, 420 US 730 (1975)(and cases cited therein). Both Lascaris and this case were pending when P.L. 93-647 was enacted and signed, but the effective date of the statutory amendment was set by Congress as July 1, 1975. After this Court's decision in Lascaris, and prior to that date, however, Congress acted again, to postpone the effective date until August 1, 1975 in order to further consider the questions raised in this litigation and elsewhere, P.L. 94-46, Section 2. Finally in P.L. 94-88 (effective August 1, 1975) Congress acted again, setting out a statutory exemption to the cooperation requirement for those cases in which a parent had good cause to refuse to pursue a support obligation taking into account the child's best interests, P.L. 94-88, Section 208. At the same time, Congress mandated extraordinarily close legislative supervision over the process of fleshing out the exception by providing that HEW's regulations would be subject to legislative review.

P.L. 93-647 became, as to its self-implementing aspects, effective with the passage of P.L. 94-88, August 1, 1975. But the "cooperation" requirement is not self-implementing. Rather, by statute it requires new regulations, P.L. 94-88 Section 208. Those regulations have not been issued, though some proposed regulations have been published, 41 Fed. Reg. 34296. Thus Section 402(a)(26) has not yet become effective, and this Court's decision in Lascaris still stands as the law until it does. The District Court sought to follow Lascaris and, through its injunction in this case to fulfill Congress' intent that children's best interests provide the touchstone. It was clearly correct and should be affirmed.

The argument to the contrary is not persuasive. The appellant notes that HEW had created a very limited exception to the "cooperation" requirement by regulation designed to be effective the same day as P.L. 93-647: 45 C.F.R.303.5 (40 Fed Reg 27165). But that regulation was designed to implement 402(2)(26) as

it stood in P.L. 93-647; due to the passage of P.L. 94-46 and subsequently P.L. 94-88 that section never became effective. P.L. 94-88 accomplished two very significant changes; it created a strict legislative supervision over the regulation, and it mandated a broader excetption than HEW had proposed[5] See H. Rept. 94-368 pp. 7, 8, 12, and 121 Cong. Rec. S14923 (Sen. Long). As passed in both House (121 Cong. Rec. HB157) and Senate (121 Cong. Rec. S14924), P.L. 94-88 was to be effective August 1, 1975 and President Ford did not suggest otherwise when he signed it into law August 8, 1975.

Thus the District Court was correct when it read the legislative history of P.L. 94-88 as supporting "the wiser course.../17/ to postpone any enforcement until the new regulations have been issued and approved" 414 F Supp at 1381 n 20.

IV. THE QUESTION DOES NOT HAVE SUBSTANTIAL IMPACT WARRANTING PLENARY REVIEW

A number of additional factors make this case appropriate for summary dismissal or affirmance. They are grouped together in this section because all reflect on the sound policy of handling the mandatory docket of this Court as expeditiously as possible. The questions as proposed by the appellant lack the broad application or massive impact necessary to qualify them as substantial.

A. Proposed Regulations

As noted throughout the Jurisdictional Statement, HEW has proposed regulations in response to the Congressional mandate of P.L. 94-88, 41 Fed Reg 34294-34301. The comment period has long since expired on these proposals.

5/ The District Court for the District of Columbia has refused to enjoin Section 303.5, Coe v. Mathews Civil Action 76-0794 (November 26,1976) (app. pending) (Corcoran,J).

The likelihood that HEW will promulgate some regulation before the Court hears this case in full is high. If that occurs, the Court would probably remand the case to the District Court. Even if it did not do so, the appellant would no longer be aggrieved by the terms of the injunction, since he would have to follow federal law with or without it. Since the effective federal law will soon change, affirmance without extended discussion best facilitates resolution of this already protracted litigation. See Lascaris v. Shirley (supra).

B. Local Scope of Decision

Connecticut's statute C.G.S. Section 52-440b with its possibility of incarceration as a civil contempt in addition to denial of welfare eligibility for refusal to disclose and prosecute putative fathers, is highly unusual. The State has not indicated that the injunction has resulted or will result in any financial loss to it, or even that 52-440b has ever been of any financial benefit to it. Indeed, a reading of the Jurisdictional Statement indicates scant interest in 52-440b. This case ought therefore finally be affirmed leaving future issues to future parties and litigation.

Furthermore Connecticut's attempt to define mothers unable to comply because they don't know the fathers' names as being neither cooperative nor uncooperative but somehow appropriately subject to immediate action under the statute flies in the face of all logic, as well as the proposed regulations. Obviously mothers are cooperating as far as they can. If for some reason the state believes, in a given case, that the mother is lying, she and her children deserve at least the same protections as those mothers who are unwilling to cooperate.

CONCLUSION

The direct appeal statute does not apply to this case and the appeal should therefore be dismissed. In the event the merits are reached, the Court should summarily affirm the Judgment of the District Court because the injunction was well within the Court's powers, the District Court correctly noted that the federal "cooperation" requirement was not yet effective and the appeal does not raise questions which will be of substantial import if the case is fully heard.

RESPECTFULLY SUBMITTED

By _____

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December 23, 1976

CERTIFICATE OF SERVICE

This is to certify that on the 23rd day of December , 1976, copies of the foregoing Motion to Dismiss or Affirm were mailed postage prepaid to:

CARL AJELLO, ESQ.
Attorney General of the State
of Connecticut
30 Trinity Street
Hartford, Connecticut 06115

and

MICHAEL ARCARI, ESQ.
Assistant Attorney General
90 Brainard Road
Hartford, Connecticut 06114

_____
Frank Cochran

CERTIFICATE OF SERVICE

This is to certify that on the 23rd day of December, 1976 copies of the foregoing were mailed, postage prepaid to counsel of record below and in this Court:

CARL AJELLO, Attorney General
of the State of Connecticut
30 Trinity Street
Hartford, Connecticut 06115

MICHAEL ANTHONY ARCARI, ESQ.
Assistant Attorney General
90 Brainard Road
Hartford, Connecticut 06114

DAVID ROSEN, ESQ.
Rosen, Dolan and Koskoff
265 Church Street
New Haven, Connecticut 06510

Frank Cochran

Affidavit In Support of Motion of the
Class of Plaintiff-Appellee Mothers
to Proceed Herein In Forma Pauperis

State of Connecticut
ss At Hartford
County of Hartford

I, FRANK COCHRAN, Esquire, being first duly sworn, depose and say:

1. I am, and have been, the attorney of record for plaintiffs-appellees Sharon Roe, Doeothy Poe, Hattie Hoe, and Jane Robustelli, (plaintiff mothers) and for the class and subclasses of plaintiff mothers as they have been defined and certified during the course of this litigation.

2. All of my individual clients, and to the best of my knowledge all individuals actually threatened with enforcement of Connecticut General Statutes Section 52-440b are and have at all relevant times been recipients of assistance from the Connecticut Department of Social Services (formerly the Welfare Department) under the Aid to Families with Dependent Children (AFDC) program.

3. Plaintiff-mothers have always proceeded in forma pauperis in these actions. Specifically, plaintiff-mothers in Donna Doe et al v Nicholas Norton, D. Conn. Civil Action No. 15,579 at all times proceeded in forma pauperis, plaintiff-mothers in Sharon Roe et al v Nicholas Norton, D. Conn. Civil Action No. 15,589 proceeded in forma pauperis both at the trial level and before this Court on appeal 415 U.S. 912, and intervenors Hattie Hoe and Jane Robustelli were permitted to intervene in forma pauperis on remand.

4. The District Court has consistently, and without present opposition, permitted this action to proceed as a class action changing the definition of the classes and subclasses under Rule 23 of the Federal Rules of Civil Procedure.

5. To the best of my knowledge and belief, all of the class members threatened with or summoned under the statute in issue have been recipients of state welfare and unable, due to the poverty, to pay the costs of this litigation.

6. I have never received a fee for service in this action from any plaintiff-mother member of the class during the course of this litigation.

7. Although I have been unable to locate all of the individuals represented below, affidavits from those members of the class who are available are also attached to this motion.

Frank Cochran

Sworn to and subscribed before me this the 23rd day of December, 1976.

Commissioner of Superior Court

Affidavit In Support of Motion For
Leave to Proceed in Forma Pauperis
On Appeal

State of Connecticut : ss at Niantic, December , 1976
County of New London

I, Hattie Hoe, a fictitious name I have taken solely to protect my privacy in the course of the litigation known as Maher v Doe et al, and being first duly sworn, depose and say:

1. I am a plaintiff-appellee in this case, having been admitted as an intervening member of the class of plaintiff-mothers on remand of this action.

2. I am confined at the Connecticut Correctional Institution at Niantic and am unable to support myself.

3. I have insufficient funds to pay the costs of appeal or to provide security for such costs.

4. I own no real estate or other substantial property whatsoever.

5. The District Court permitted me to proceed in forma pauperis. My circumstances have not changed since that decision.

Hattie Hoe

Sworn and subscribed before me this the 20th day of December, 1976

Notary Public

My Commission expires 4/10/79.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 76-878

EDWARD W. MAHER, Commissioner of Social Services of the State of Connecticut

Appellant,

v.

DONNA DOE, ET AL

Appellee.

On Appeal From The United States District Court For The District of Connecticut

APPELLANT'S REPLY BRIEF IN OPPOSITION TO APPELLEE'S MOTION TO DISMISS OR AFFIRM

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SUBJECT INDEX

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APPELLANT'S REPLY BRIEF IN OPPOSITION TO APPELLEE'S MOTION TO DISMISS OR AFFIRM

I. INSOFAR AS THE STATUTORY CLAIM IS CONCERNED, THE DECISION OF THE THREE-JUDGE DISTRICT COURT DOES NOT FALL OUTSIDE THE PURVIEW OF 28 U.S.C. ∫ 1253.

The Appellees assert that this Court does not have jurisdiction of this appeal even though a three-judge district court was convened to hear the merits of Appellees' constitutional claim. The Appellees base their assertion on the claim that "[t]he order at issue in this case could have been made by a single judge. . . . [and that a] three-judge court is not required to enjoin enforcement of a state law that conflicts with a fed-

eral statute. . . ." Appellees' Motion to Dismiss or Affirm, page 6; material in brackets supplied. The short answer to this contention is found in what this Court stated in *Philbrook* v. *Glodgett*, 421 U.S. 707 (1975), which is as follows:

> ". . . At oral argument a question arose regarding the jurisdiction of this Court over the appeals, 28 U.S.C. § 1253, and the parties have filed supplemental briefs on this point. On authority of *Gonzales* v. *Automatic Employees Credit Union*, 419 U.S. 90 (1974), and *MTM, Inc.* v. *Baxley*, 420 U.S. 799 (1975), appellant Weinberger contends that any appeal from the District Court's judgment should have been taken to the Court of Appeals; appellant Philbrook and appellees contend that the appeals are properly before this Court.
>
> In *Hagans* v. *Lavine*, 415 U.S. 528 (1974), this Court indicated that it was the preferred practice for a single judge, when presented with both statutory and constitutional grounds for decision, to resolve the statutory claim before convening a three-judge court. The District Court in this case was unable to proceed in that manner because appellees raised only constitutional contentions in their complaint, App. 10, and raised their statutory contention, for the first time, at oral argument before the three-judge court. Tr. of Oral Arg. before the United States District Court for the District of Vermont 42-44 (Mar. 5, 1973). Appellant Weinberger urges us to reconsider our decision in *Engineers* v. *Chicago, R.I. & P. R. Co.*, 382 U.S. 423 (1966), in which we held that, if a three-judge court is convened and decides a case on statutory grounds, the judgment may be appealed to this Court under 28 U.S.C. § 1253, but we decline to do so." 421 U.S., at 712-713 n.8.

In this appeal, the three-judge court not only decided the merits of the statutory claim, but, once again, decided the

merits of the Appellee's constitutional claims by adhering to the conclusions reached in that Court's former opinion.[1] *Doe* v. *Maher*, 414 F.Supp. 1368, 1371, 1381, 1382 (1976). The Appellant has appealed to this Court "from an order *granting* . . ., after notice and hearing, . . . [a] permanent injunction in [a] civil action, suit or proceeding required by . . . Act of Congress to be heard and determined by a district court of three judges." 28 U.S.C. § 1253; material in italics and brackets supplied.[2] The order thus appealed from constitutes an appealable judgment to this Court under § 1253 in that such an order appealed from involved the three-judge court's resolution of the merits of the statutory claim in a civil action where constitutional claims were pleaded[3] and the merits thereof were resolved by the three-judge court. Even if the three-judge court never reached the merits of the constitutional claims after remand of this case by this Court, the merits of the statutory claim were decided by the three-judge court and the resulting order granting the injunction still constituted an appealable judgment under § 1253. *Engineers* v. *Chicago, R.I. & P. Co.*, 382 U.S. 423, 428 (1966). Furthermore, the narrow construction given § 1253 by this Court is not applicable in direct review of three-judge court orders that grant injunctions. *Gonzales* v. *Employees Credit Union*, 419 U.S. 90, 98 (1974).

Nor is this appeal inconsistent with any other rules set forth by this Court relative to jurisdiction under § 1253. The decision of the three-judge court went beyond any mere con-

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[1] After remand of this case from this Court, Appellees renewed their constitutional claims as set forth in the Appellees' complaints, intervening complaints, and oral argument. Doe v. Maher, 414 F.Supp. 1368, 1371, 1381, 1382 (1976); Tr. of oral Arg. before the United States District Court, for the District of Connecticut (on order).

[2] For more detail concerning said order appealed from, see Appellant's Jurisdictional Statement.

[3] The constitutional claims basically consisted of the constitutionality of § 52-440b of the General Statutes of Connecticut, of § 404.6 of the Connecticut Welfare Regulations, and of the defendant's actions under and enforcement of § 52-440b through the defendant's welfare regulations. Such claims of unconstitutionality were not grounded on the Supremacy Clause.

sideration of dismissing the Appellee's complaint and beyond merely dealing with issues short of the merits 'such as justiciability, subject-matter jurisdiction, equitable jurisdiction, and abstention' — considerations which prompted this Court's holdings in *MTM, Inc.* v. *Baxley*, 420 U.S. 799, 802 (per curiam 1975) and in *Gonzalez* v. *Employees Credit Union*, supra at 101. Underscoring the decisions in *Baxley* and in *Gonzalez* relative to jurisdiction under § 1253 and applicable to the instant appeal is the concept that § 1253 authorizes direct review by this Court . . . as a means of accelerating a final determination on the merits. . . . of any constitutional challenge not grounded on the Supremacy Clause or of any Supremacy Clause challenge where there is also asserted a constitutional challenge which is not grounded on the Supremacy Clause. *Gonzalez* v. *Employees Credit Union*, supra at 96 and at n.14; *Swift & Co.* v. *Wickham*, 382 U.S. 111, 119 (1965); *Engineers* v. *Chicago*, supra at 428.

As the Appellees asserted constitutional claims which were not grounded on the Supremacy Clause before and after the remand of this case, no ground existed upon which a single judge could have declined to convene a three-judge court. See *Gonzalez* v. *Employees Credit Union*, supra at 100. Because the merits of the statutory claim and the merits of the constitutional issues asserted by the Appellees were decided by the three-judge court, a justifiable ground was also lacking upon which the three-judge court could have dissolved itself. Even if the merits of Appellee's constitutional issues were not reached by the three-judge court and the three-judge court granted an injunction on the merits of the statutory claim alone, under the authority of *Engineers* v. *Chicago R.I & P.R. Co.*, supra, such an order granting the injunction would be an appealable judgment under § 1253.

Should this Court have cause to conclude for any reason that this appeal is not within the purview of § 1253, the Appellant prays that this court exercise its power by vacating the order before this Court "and remand this case to the District Court so that a fresh order may be entered and a timely appeal prosecuted to the Court of Appeals." *MTM, Inc.* v. *Baxley*, supra at 804; see *Gonzalez* v. *Employees Credit Union*, supra at 101; *Mitchell* v. *Donovan*, 398 U.S. 427, 431 (1970); *Stamler* v. *Willis*, 393 U.S. 407 (1969); *Mengelkoch* v. *Welfare Comm'n.*, 393 U.S. 83, 84 (1968); *Utility Comm'n.* v. *Pennsylvania R. Co.*, 382 U.S. 281, 282 (1965); *Phillips* v. *United States*, 312 U.S. 246, 260 (1941).

II. THERE IS A SUBSTANTIAL QUESTION WARRANTING PLENARY REVIEW.

The Appellant has set forth in his Jurisdictional Statement his argument as to whether substantial questions exist warranting plenary review and the same need not be reiterated here. The argument in the Appellees' motion to dismiss or affirm dealing with this question of whether substantial questions are involved in this appeal supports the points brought out in the Appellant's Jurisdictional Statement rather than detracting from it. Indeed, the Appellees' argument only serves to emphasize that the need for plenary review of the action below is indisputable and the Appellant suggests that summary reversal of the order appealed from is now in order.

The Appellant has not abandoned the claim that the three-judge court misapplied the doctrine of comity or abstension judge court misapplied the doctrine of comity or abstention discussed in *Younger* v. *Harris*, 401 U.S. 37 (1971). The doctrine has to do with restraining equity jurisdiction and the question of whether it should have been invoked by the three-judge court is still before this Court in the instant appeal even though the Appellant has not expressly stated the issue in his jurisdictional statement. The doctrine was one of the reasons why this Court previously remanded this case to the District

Court. Since the doctrine goes to the jurisdiction of the District Court, this Court has the power, if not the duty, on its own to remand to the District Court with instructions to apply the doctrine if the District Court was in error for concluding that the doctrine was not applicable in this case.
Roe v. *Norton*, 422 U.S. 391 (1975).

CONCLUSION

For the foregoing reasons, the Appellant prays that the Appellees' motion to dismiss or affirm be denied.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM 1976

No. 76-878

EDWARD MAHER, Commissioner of Social Services for the State of Connecticut,

Appellant,

—v.—

DONNA DOE, *et al.*,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF CONNECTICUT

BRIEF *AMICUS CURIAE* OF THE STATE OF ALASKA

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF CONNECTICUT

BRIEF *AMICUS CURIAE* OF THE STATE OF ALASKA

This brief *amicus curiae* is submitted by the State of Alaska pursuant to Rule 42(4) of the Rules of the Supreme Court of the United States. *Amicus* urges the Court to summarily affirm the judgment below.

In the alternative, should the Court be inclined to note probable jurisdiction and schedule plenary consideration, *amicus* urges that this case be heard together with *Jane Coe et al.* v. *F. David Mathews,* in which a petition for *certiorari* before judgment will be filed by *amicus* and others by January 17, 1977.[1] As will be discussed *infra,*

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[1] *Coe* v. *Mathews* was decided on November 23, 1976 by the District Court in the District of Columbia. An appeal was docketed on December 16, 1976 in the Court of Appeals for the D.C. Circuit. No. 76-2118.

amicus joined as co-plaintiff in *Coe* v. *Mathews* with five welfare recipients and the National Welfare Rights Organization to challenge regulations of the Secretary of Health, Education, and Welfare which are directly called into question by the appeal in this case.[2]

Statement of Interest

Amicus State of Alaska administers the Aid to Families With Dependent Children (AFDC) program established by Title IV of the Social Security Act through its Department of Health and Social Services. As a state participating in the AFDC program Alaska is required to comply with the various conditions placed upon it by Congress and by the Secretary of Health, Education, and Welfare (HEW) in order to qualify for the substantial federal financial contribution towards the costs of its AFDC program. Alaska presently receives approximately $7,000,000 yearly from the United States, or 50% of its total AFDC costs.

One statutory condition placed on the receipt of federal funds is that each state's AFDC plan must provide that applicants for or recipients of AFDC must, as a condition of eligibility, cooperate with the state in establishing the paternity of children born out of wedlock, and in securing support for those other children who qualify for aid because of the absence of a parent from the home, unless

[2] Co-counsel for Alaska also represents the co-plaintiffs in *Coe* v. *Mathews*, mothers and children who are being forced to cooperate with child support enforcement efforts because of HEW's regulations despite substantial fears that such cooperation will cause them serious injury, and can advise the Court that all plaintiffs in *Coe* urge the summary affirmance of the decision of the three judge court below.

such cooperation is excused for "good cause." Section 402 (a) (26) (B) of the Social Security Act, 42 U.S.C. §602(a) (26) (B), as amended by Pub. L. 94-88, §208(a) (August 9, 1975). Section 402(a) (26 (B) specifically provides that the determination of "good cause" must be made by each state agency administering the Title IV-A AFDC program "in accordance with standards prescribed by the Secretary [of HEW], which standards shall take into consideration the best interests of the child on whose behalf aid is claimed."[3] The standards referred to in §402(a) (26) (B) have not been promulgated in final form, although proposed rules were published on August 13, 1976.[4]

In the absence of regulations implementing §402(a) (26) (B), currently effective regulations of the Secretary of Health, Education, and Welfare require the states to impose child support enforcement cooperation as a condition of eligibility *without* application of the "good cause" excep-

[3] A closely related statutory requirement for the receipt of federal AFDC funds is that each state operate a child support enforcement program under Title IV-D of the Act. Section 402(a) (27) of the Social Security Act, 42 U.S.C. §602(a) (27). Title IV-D, in turn, requires, *inter alia*, that each state establish a child support enforcement agency, 42 U.S.C. §654(3), and that such agency undertake to establish the paternity of illegitimate children and enforce support obligations owed to all AFDC children "unless the agency administering the plan of the State under part A of this title determines in accordance with the standards prescribed by the Secretary pursuant to section 402(a) (26) that it is against the best interests of the child to do so. . . ." 42 U.S.C. §654(4) (A) and (B), as amended by Pub. L. 94-88, §208(b), (c).

[4] 41 Fed. Reg. 34298. Approximately 1500 comments were received by HEW as a result of the notice of proposed rulemaking and it is very unlikely, as appellant Maher indicates, that final rules can be expected very soon. Even after publication of final rules, an additional 60 day period must lapse before they can become effective during which time Congress may exercise a "veto" power over the rules. Pub. L. 94-88, §208(d).

tion, 45 C.F.R. §232.12 (June 26, 1975).[5] HEW has advised Alaska and other states that they are not free to adopt their own "good cause" standards pending promulgation of the mandated HEW standards.[6]

The State of Alaska believes that, despite these HEW regulations, it is not required by the Social Security Act to require AFDC applicants and recipients to cooperate in establishing paternity and securing support, nor is it required to establish paternity and secure support, until that statutory requirement is *fully* implemented by the

[5] HEW Regulations also require state child support agencies under Title IV-D to establish paternity and secure support despite the absence of the standards required by Pub. L. 94-88 for determining the "best interests of the child." See 45 C.F.R. §§302.31, 303.4, 5, 6. HEW rules do permit the states a very limited exception to the establishment of paternity requirement, 45 C.F.R. §303.5, but that exception was rejected as inadequate by Congress in Pub. L. 94-88. See *infra*, p. 12.

[6] We note appellees' reference in their motion to appellant's failure to promulgate "best interest" standards allegedly required by state law. (Motion to Dismiss or Affirm, p. 12.) It is clear that appellant's failure to promulgate such rules is not culpable, however, but is the necessary consequence of current HEW policy. That policy, required by the clear language of §402(a) (26) (B) providing for HEW promulgation of "best interest" standards, bars appellant, just as it bars Alaska, from issuing best interest standards prior to HEW's issuance of such standards under Pub. L. 94-88. Indeed, the appellant is generally under a state statutory duty to promulgate such rules as may be necessary to conform to federal requirements for the receipt of AFDC matching funds, C.G.S.A. §17-83(a), and thus even under state law appellant may not issue the best interest standards until HEW completes its responsibilities under Pub. L. 94-88. Once HEW's "best interest" standards are issued, however, appellant will be in a position to promptly institute the cooperation requirement since the terms of the order below will be satisfied, and since Connecticut law requires issuance of such state implementation of the federal standards on an emergency basis, without the usual notice and comment rulemaking provisions of state law. See Public Act 76-334, and C.G.S.A. §168(b).

promulgation, in final form, of the standards under which the "good cause/best interest" finding is to be made. The State firmly believes that the best interests of children receiving AFDC assistance should be protected in any scheme for requiring cooperation in the identification and location of absent parents and the collection of child support from those parents. Accordingly, the State does not wish to implement any mandatory cooperation requirements until the HEW guidelines required by Pub. L. 94-88 to protect the best interests of the child have been adopted by HEW. The existing guidelines, at 45 C.F.R. §303.5, which were specifically rejected by Congress and in any event only apply to paternity actions, do not adequately protect those best interests in Alaska.

Because of the State's unwillingness to implement the HEW regulations[7] it has subjected itself to a substantial risk that it will either lose all of its future federal funding for its AFDC program, 42 U.S.C. §604(a), or suffer a substantial retrospective financial penalty, 42 U.S.C. §§603 (h), 604(d). In order to protect itself from such risks, and in order to protect the interests of those mothers and children it seeks to serve through its AFDC program, Alaska filed suit against HEW Secretary Mathews seeking declaratory and injunctive relief against the continued enforcement of the HEW regulations referred to above. That suit, *Coe* v. *Mathews*, was decided in the defendant's favor by the District Court for the District of Columbia (Corcoran, J.) on November 23, 1976, in a decision directly

[7] Alaska has implemented the child support program on a voluntary basis, permitting AFDC applicants and recipients to excuse themselves from cooperation simply by indicating to the welfare agency that they believe cooperation would be against their child's interests.

contrary to the decision in the instant case. Had the reasoning and order of the court below been applied by the *Coe* court, *amicus* would be freed of the responsibility for implementing the federal regulations challenged in *Coe*. The Court's decision on the appeal in this case will thus be determinative of *amicus'* rights being litigated in *Coe* v. *Mathews*,[8] and thus *amicus* has a direct and substantial interest in the outcome of this case.

ARGUMENT

I.

The judgment below should be summarily affirmed.

As is set forth in the Jurisdictional Statement and Motion to Dismiss or Affirm, this case has had a long judicial history. As originally filed, this case challenged a Connecticut statute (C.G.S.A. §52-440b) under which unwed mothers were held in contempt of court if, upon being subpoenaed, they refuse to disclose the paternity of their children. The three judge court upheld the state statute under various constitutional and federal statutory attacks, 365 F. Supp. 65, and plaintiffs appealed to this Court.

Subsequent to this decision Congress enacted Pub. L. 93-647, providing, *inter alia*, that AFDC programs must condition the mother's eligibility for AFDC on her willingness to cooperate. See §402(a) (26) (B), as added, 88 Stat. 2359.[9] This Court, noting that the new federal statute had

[8] Because the decision herein will be determinative of the issues in *Coe, amicus* and its co-plaintiffs in *Coe* will seek summary reversal of the *Coe* decision in the petition for *certiorari* to be filed.

[9] Such state rules were theretofore inconsistent with the Social Security Act. See *Lascaris* v. *Shirley*, 420 U.S. 730 (1975). Connecticut had been enjoined from imposing a "cooperation" eligibility rule prior to *Lascaris*. See *Doe* v. *Shapiro*, 302 F. Supp. 761 (D. Conn. 1969), *appeal dismissed*, 396 U.S. 488 (1970); *Doe* v. *Harder*, 310 F. Supp. 302 (D. Conn.), *appeal dismissed*, 399 U.S. 902 (1970).

no sanction that was comparable to Connecticut's contempt penalty, vacated the judgment of dismissal and remanded for consideration, *inter alia*, of the effect of Pub. L. 93-647. *Roe* v. *Norton*, 422 U.S. 391 (1975). On remand, the court below reiterated its dismissal of the constitutional claims, and further ruled that Congress had not intended to preempt Connecticut from applying a supplementary sanction to that imposed by the federal child support statute. 414 F. Supp. 1368. These rulings were not appealed to this Court.

Subsequent to the remand in this case, Connecticut began to impose a cooperation requirement as a condition of eligibility based on the HEW regulations noted above.[10] However, also subsequent to the remand Congress enacted Pub. L. 94-88, which took effect at the same time as Pub. L. 93-647. As noted above, this legislation provided an exception to the cooperation requirement where the mother had good cause for refusing to cooperate, and required the states to determine "good cause" under standards required to be promulgated by the Secretary of HEW which were to "take into consideration the best interests of the child on whose behalf aid is claimed." The court below ruled, on the remand, that both the original contempt sanction and eligibility sanctions were subject to this statutory amendment.

The three judge court ruled that appellant Maher may not, consistent with the Social Security Act, terminate the

[10] Connecticut Department of Social Services Public Assistance Program Manual, §404.6 (eff. Nov. 1, 1975).

eligibility of appellee AFDC mothers because of their failure to cooperate in establishing the paternity of their children. While the court recognized that Congress has authorized such a state-imposed eligibility requirement in §402(a) (26) (B), it held that the federal statutory authorization could "not be enforced in a manner contrary to the best interests of the very children whom the AFDC program is intended to assist", and that since the HEW standards required by Pub. L. 94-88 for determining whether such enforcement would be contrary to the child's best interests were not yet in effect, it ruled that appellant must "postpone any enforcement until the new regulations have been issued and approved." *Doe* v. *Maher*, 414 F. Supp. at 1381, n. 20.[11]

Connecticut has appealed from the order to the extent that it requires postponement of the cooperation eligibility requirement. The State wishes to enforce the cooperation requirement originally established by Pub. L. 93-647 despite the fact that the requirement has not been fully implemented by HEW as required by Pub. L. 94-88.[12] The State wishes to provide only those limited exceptions to the cooperation requirement as are now provided for in

[11] Thus, the order of the lower court was that appellant

"shall not remove plaintiff mothers from the status of eligibility . . . until after full compliance with the provision of Section 402(a) (26) of the Social Security Act as amended. . . ." Juris. Statement, p. 37.

Such "full compliance " would, of course, require a "best interest" determination under HEW's yet to be issued standards.

[12] The Appellant does not complain that the contempt sanction was required to be applied consistent with the condition in §402(a) (26) (B) for applying the eligibility sanction. The dispute is over whether or not §402(a) (26) (B) itself is operative so as to authorize *either* the contempt *or* eligibility sanction at this time.

45 C.F.R. §303.5, the regulation based on Pub. L. 93-647 and specifically rejected by Congress' enactment of Pub. L. 94-88.

Amicus is of the view that the portion of the decision below which has been appealed to this Court is so clearly correct that summary affirmance, as requested by appellees, is in order.[13] *Amicus* does not believe it is required to im-

[13] In this regard, *amicus* believes that affirmance, rather than dismissal, is appropriate because the Court has jurisdiction over the appeal under 28 U.S.C. §1253. Appellees contend that since the injunction entered by the three-judge court could have been entered by a single judge, since it was based on Supremacy Clause grounds, the appeal properly lies in the Court of Appeals under this Court's decision in ***MTM*** v. ***Baxley***, 420 U.S. 799 (1975). *Amicus* disagrees. ***MTM*** did not involve an appeal from a decision on the merits, or from a decision granting injunctive relief, as does this case, and thus the decision in ***MTM*** does not require dismissal of this appeal. Further, only 5 days prior to the ***MTM*** decision this Court accepted jurisdiction over an appeal under §1253 in ***Lascaris*** v. ***Shirley***, 420 U.S. 730 (1975), a case in which another state's "cooperation" requirement had been enjoined by a three-judge court on Supremacy Clause grounds. Shortly after ***MTM*** the Court expressly declined to apply ***MTM*** to an appeal under §1253 of a three judge court injunction issued on Supremacy Clause grounds, after requesting re-briefing on the issue because of the intervening ***MTM*** decision. ***Philbrook*** v. ***Glodgett***, 420 U.S. 707 (1975). Moreover, we note that while the Court has indicated that Supremacy Clause issues should preferably be decided by a single judge court, ***Hagans*** v. ***Lavine***, 415 U.S. 528 (1974), this was not a case in which such a course was desirable. The three-judge court was originally convened prior to the ***Hagans*** decision, 356 F. Supp. 202, and, moreover, the Supremacy Clause injunction which was issued after this Court's remand could not have resolved, and did not in fact resolve, the substantive constitutional claims, see 414 F. Supp. at 1381. Cf. ***Hagans*** v. ***Lavine, supra,*** 415 U.S. at 544-45. Therefore, judicial economy properly called for a three-judge court resolution of the case. In sum, since a three-judge court had the power to hear the entire case, and in fact properly exercised that power, an appeal lies directly in this Court, despite the fact that the basis for the relief was the Supremacy Clause. See ***Philbrook*** v. ***Glodgett, supra; Engineers*** v. ***Chicago, R.I. & P.R. Co.,*** 382 U.S. 423 (1966); ***Florida Lime & Avacado Growers,***

plement the cooperation requirement until it can be fully implemented with the HEW "best interest" exception, and thus believes it is entitled to be in the same position Connecticut finds itself in, albeit against its will, as a result of the order below. The reasons for *amicus'* position will be set out in detail in the petition for *certiorari* before judgment that will be filed in *Coe* v. *Mathews* by January 17, 1977. Our position is summarized below.

This Court has recently held that state AFDC programs may not, consistent with the Social Security Act, condition eligibility for aid on the willingness of the caretaker relative of the children to cooperate with the state in establishing the paternity of children born out of wedlock and in securing child support owed to the children. *Lascaris* v. *Shirley,* 420 U.S. 730 (1975), *affirming,* 365 F. Supp. 818 (N.D.N.Y.) (3 judge court). The Court's reliance on its prior decisions in *Townsend* v. *Swank,* 404 U.S. 282 (1971) and *Carleson* v. *Remillard,* 404 U.S. 598 (1972), see *Lascaris* v. *Shirley, supra,* 420 U.S. at 732, indicated this Court's agreement with the district court that such a condition of eligibility was illegal in that it was not authorized by Congress and thus operated to deny aid to "eligible individuals" contrary to §402(a) (10) of the Social Security Act, 42 U.S.C. §602(a) (10). The Court noted in *Lascaris,* however, that Congress had acted to resolve the conflict by requiring "cooperation" as an eligibility condition in Pub.

Inc. v. *Jacobsen,* 326 U.S. 73 (1960). Indeed it is fortuitous that appellees did not appeal the denial of relief on their substantive constitutional claims, for had they done so, a dismissal of this appeal by the State would have meant that the case would be heard in this Court and the Court of Appeals simultaneously, with subsequent review in this Court on the Supremacy Clause claim. Such a procedure hardly comports with judicial economy.

L. 93-647, adding §402(a) (26) (B) to the Act, scheduled to take effect on July 1, 1975.

The statutory resolution of the conflict between state and federal law noted in *Lascaris* did *not* take effect as scheduled, and as assumed in the *Lascaris* decision, however. Thus, the *Lascaris* decision quite properly bars Connecticut from terminating eligibility based on the failure to cooperate in establishing paternity, which is precisely what the lower court ordered. That Congress' authorization for such cooperation requirements is not yet effective, and that *Lascaris* still governs, is readily apparent from the following:

1. In direct response to widespread dissatisfaction with major parts of the new child support legislation, especially the cooperation requirement, Congress postponed the effective date of the legislation (including §402(a)(26)(B)) from July 1, 1975 to August 1, 1975. Pub. L. 94-46.

2. Promptly after such suspension, legislation was introduced and enacted to provide for the exception to the cooperation requirement where the mother or other caretaker had "good cause." Pub. L. 94-88, §208. This amending legislation was perceived by its authors as correcting a "serious flaw" in the program which "unless corrected, could cause an irreparable damage to children and mothers." 121 Cong. Rec. H7141 (July 21, 1975) (daily ed.) (Remarks of Rep. Corman). Rep. Corman expressed the concern that *"Federal law should not cause harm* in such a process to the same children we are attempting to help through a strengthened program of enforcement of child support." *Ibid.* (emphasis added). The Ways and Means

Committee specifically indicated that it was concerned about the possibility that tracking down the absent parent might lead to "substantial danger or physical harm or undue harassment." H. Rept. 94-368, 94th Cong., 1st Sess. (1975), at 7. The Committee noted that it "did not feel that the subject had been sufficiently covered in regulations developed by the Department of HEW." *Ibid.*[14]

3. In order to correct the "flaw" in the original legislation, and to prevent the "irreparable damage" threatened by the new child support requirements, the effective date of the "exception" was deliberately chosen by Congress to coincide with the new effective date of the original legislation, namely August 1, 1975. Pub. L. 94-88, §210. See, e.g., 121 Cong. Rec. H7145 (July 21, 1975) (daily ed.); H. Rept. 94-368, 94th Cong., 1st Sess. (1975), at 8, 13.

In sum, the court below correctly required the postponement of implementation of the cooperation requirement until it can be *fully* implemented, with the "best interest" exception. *Amicus* is of the view that, like Connecticut, it too ought to be permitted to postpone implementation until the interests of the AFDC children, intended by Congress to be protected by and aided by the child support program, may be fully protected.

[14] The discredited regulations referred to by Congress are those at 45 C.F.R. §303.5, the same regulations which appellant *Maher* complains the lower court has not permitted him to implement.

II.

If probable jurisdiction is noted this case should be heard with *Coe* v. *Mathews*.

If the Court does not affirm the judgment below summarily, *amicus* suggests that it would be advisable for the forthcoming petition for *certiorari* before judgment in *Coe* v. *Mathews*, to be granted, and the cases set down for argument together. As will be fully set out in the *Coe* petition, the issues raised in this case and *Coe* are identical, and the presence before the Court of HEW Secretary Mathews as a Respondent will enable the Court to better resolve the question as to the validity of the HEW regulations, which were, in effect, invalidated by the decision below. Moreover, prompt consideration of the two cases at the same time will permit the Court to finally resolve these important federal statutory questions for all states administering the AFDC program, not just Connecticut.

CONCLUSION

The judgment below should be affirmed. If probable jurisdiction is noted or postponed, the case should be heard together with *Coe* v. *Mathews*, in which a petition for *certiorari* before judgment will be filed by January 17, 1977.

January , 1977.

Respectfully submitted,

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EDWARD W. MAHER, COMMISSIONER OF SOCIAL SERVICES FOR THE STATE OF CONNECTICUT, APPELLANT

v.

DONNA DOE, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF CONNECTICUT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF CONNECTICUT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This submission is made in response to the Court's invitation to the Solicitor General to file a brief on behalf of the United States as *amicus curiae*.

QUESTION PRESENTED

The United States will discuss the following question:

Whether a state may deny AFDC benefits to an otherwise eligible family because of the mother's refusal to cooperate with the state's efforts to establish her children's paternity and to secure support payments from the father, before the Secretary of Health, Education, and Welfare promulgates regulations establishing standards for excusing such cooperation.

STATEMENT

1. Section 52-440b, Conn. Gen. Stat. Ann. (1976 Cum. Supp.), requires the mother of a child who was born out of wedlock and on whose behalf welfare benefits are received to disclose the name of the putative father and institute a paternity action against him. Noncompliance constitutes civil contempt punishable by a fine of up to two hundred dollars and imprisonment for up to one year.

Appellees are unwed mothers who receive welfare benefits on behalf of their illegitimate children. They brought this action for injunctive and declaratory relief in the United States District Court for the District of Connecticut, alleging that Section 52-440b is inconsistent with the Social Security Act and deprives them of their constitutional rights to due process, equal protection, and privacy.[1] A three-judge district court rejected their claims and upheld the statute in all respects. *Doe* v. *Norton*, 365 F. Supp. 65 (D. Conn.). This Court noted probable jurisdiction. *Roe* v. *Norton*, 415 U.S. 912. Without reaching the merits of the case, however, the Court vacated the judgment of the district court and remanded for further consideration in light, *inter alia*, of intervening amendments to the Social Security Act. *Roe* v. *Norton*, 422 U.S. 391, 393.

2. Those amendments[2] added to Title IV of the Social Security Act a new Part D, providing for federal financial and technical assistance to approved state child support

[1]Appellees sued on their own behalf, on behalf of their children, and on behalf of a class of similarly situated women in the state who had been threatened with or cited for contempt under the statute.

[2]We have explained the statutory scheme at length in our brief in opposition in *Coe* v. *Califano*, No. 76-999, pending on petition for a writ of certiorari.

programs. 42 U.S.C. (Supp. V) 651-660. States electing to participate in the program must create a new agency (the "IV-D agency") that will undertake to establish the paternity of, and secure support payments for, any child for whom benefits are claimed under Part A of Title IV, the program of Aid to Families with Dependent Children ("AFDC"). 42 U.S.C. (Supp. V) 654(4).

Congress simultaneously amended the AFDC program to provide that state plans must require, as a condition of eligibility, that aid applicants or recipients cooperate with the state IV-D agency's efforts to establish paternity and secure support payments. 42 U.S.C. (Supp. V) 602(a)(26). The recipient's cooperation is excused, however, if the state agency administering the AFDC program (the "IV-A agency") finds, "in accordance with standards prescribed by the Secretary, which standards shall take into consideration the best interests of the child," that there is "good cause" for the recipient's refusal to cooperate. 42 U.S.C. (Supp. V) 602(a)(26)(B). Similarly, the enforcement obligations of the state IV-D agency are subject to exception if the IV-A agency has determined in accordance with the Secretary's standards that compliance would not be in the child's best interests. 42 U.S.C. (Supp. V) 654(4).

These amendments became effective on August 1, 1975.[3] Congress provided, however, that the "good cause" regulations to be prescribed by the Secretary would not become effective until sixty days after being submitted to Congress.[4] The Secretary has promulgated regulations implementing the mandatory recipient cooperation and state enforcement requirements added by the amendments.

[3] Pub. L. 94-46, Section 2, 89 Stat. 245; Pub. L. 94-88, Section 210, 89 Stat. 437.

[4]Pub. L. 94-88, Section 208(d)(1), 89 Stat. 436.

45 C.F.R. Parts 232, 301-304. He also has published proposed "good cause" regulations (41 Fed. Reg. 34298), but those regulations have not been submitted to Congress and are not yet in effect.

3. On remand, the three-judge district court ruled that abstention was not required (J.S. App. A, pp. 10a-20a)[5] and reaffirmed its prior holding that Section 52-440b is constitutional (*id.* at 29a). It also held that the new federal enactments did not in general preempt the state statute, since both shared a common goal of establishing the paternity of and securing support payments for illegitimate children. The court did, however, enjoin appellant from beginning or continuing contempt proceedings under Section 52-440b, or from removing unwed mothers from the AFDC rolls for noncompliance with the cooperation requirement imposed by 42 U.S.C. (Supp. V) 602(a)(26), unless appellant first determines that the "good cause" exception of Section 602(a)(26) does not apply (J.S. App. A, p. 31a).

DISCUSSION

We submit that until the Secretary's "good cause" regulations are in effect the state should enforce the Part IV-D paternity and child support program except where the state concludes, pursuant to its own *ad hoc* determination of "good cause," that it would not be in the child's best interests to do so. Although we disagree with appellant's contention (J.S. 8-15) that 45 C.F.R. 303.5 establishes interim "good cause" regulations, the absence of presently effective regulations is not a bar to the states' enforcement of the new legislation.

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[5]In its order vacating and remanding, this Court had directed the district court further to consider its decision in light of *Younger* v. *Harris*, 401 U.S. 37, and *Huffman* v. *Pursue*, 420 U.S. 592. *Roe* v. *Norton*, *supra*, 422 U.S. at 393.

1. 45 C.F.R. 303.5 is one of several regulations that the Secretary had promulgated to implement the IV-D agency's enforcement responsibilities before Congress had added the "good cause" exception to the mandatory recipient cooperation and state enforcement requirements of the legislation.[6] That regulation provides that the IV-D agency need not attempt to establish paternity in cases involving incest, rape, or pending adoption proceedings "if, in the opinion of the IV-D agency, it would not be in the best interests of the child to establish paternity." It says nothing about the IV-D agency's responsibility to enforce support obligations in cases "in which the obligation to support and the amount of the obligation have been established" (45 C.F.R. 303.6). Nor does it say anything about the IV-A agency's responsibility to determine whether there is "good cause" for excusing an unwed mother from the cooperation requirement, or about the IV-D agency's paternity or support enforcement obligations in light of such a determination by the IV-A agency. In short, 45 C.F.R. 303.5

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[6]In its original form, the federal legislation establishing the Title IV-D state enforcement program and amending Title IV-A to provide for recipient cooperation did not contain a "good cause" exception. See Pub. L. 93-647, 88 Stat. 2337. Shortly before the scheduled effective date of July 1, 1975, Congress postponed the effective date to August 1, 1975 (Pub. L. 94-46, Section 2, 89 Stat. 245) and thereafter added the "good cause" exception (Pub. L. 94-88, 89 Stat. 433, 436). The regulations implementing the IV-D state enforcement program, 45 C.F.R. Parts 301-304, also were initially scheduled to take effect on July 1, 1975 (40 Fed. Reg. 27157-27169); their effective date was postponed to August 1, 1975, to reflect the altered effective date of the legislation itself (40 Fed. Reg. 31766-31767), but they were not (and have not yet been) amended to reflect the good cause exception subsequently added to the legislation.

was never intended to be an interim substitute for regulations by the Secretary under Part IV-A.[7]

2. Even though there are no "good cause" regulations currently in effect under Part IV-A, it does not follow that, in the interim, the states should either forego implementation of the recipient cooperation and state enforcement provisions of the legislation, or enforce those provisions without regard to the best interests of the children involved in individual cases. Either of those alternatives would defeat Congress' intent.[8] Accordingly, the Secretary has taken the

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[7]Nor do we agree with appellant's contention (J.S. 15-16) that the district court held 45 C.F.R. 303.5 invalid. The court never mentioned that regulation, and its judgment does not prohibit the Part IV-D agency from attempting, with or without the recipient's cooperation, to establish paternity (the obligation to which 45 C.F.R. 303.5 applies) or to secure support payments.

Appellant correctly notes (J.S. 9-11) that the district court's judgment applies not only to Section 52-440b, but also to Section 404.6 of the regulations of the Connecticut Department of Social Services (J.S. App. D), which provides, *inter alia*, that an unwed mother who refuses to name the putative father of her illegitimate child will be cited to appear before the Court of Common Pleas and compelled to do so, and in addition will be declared ineligible for assistance. Section 404.6 as originally promulgated is no longer in effect, having been amended by appellant to comply with his understanding of the court's decision. See J.S. App. G.

[8]Congress clearly believed that the establishment of paternity and securing of support payments would be in the best interests of the child in most cases. S. Rep. No. 93-1356, 93d Cong., 2d Sess., pp. 42-44, 48-52 (1974). To postpone enforcement of the mandatory recipient cooperation and state enforcement aspects of the legislation until the Secretary's "good cause" regulations become effective therefore would frustrate the legislative will that illegitimate children enjoy the benefit of those provisions as of August 1, 1975. At the same time, enforcement of those provisions without regard to the "good cause" exception would frustrate Congress' desire to assure that enforcement would not be undertaken in the limited number of cases where the child's best interests are to the contrary.

position that until his regulations become effective[9] the states, "on a case by case basis, should utilize care and common sense in administering the program so that children and their custodial parents or caretaker relatives will not be harmed as a result of cooperating with the State in establishing paternity or obtaining support."[10] In other words, the states should make their own "good cause" determinations until the federal regulations are in effect.[11]

3. Whether the district court's judgment permits appellant to make "good cause" determinations is unclear. Appellant believes that the court has enjoined him from enforcing the new legislation in any respect (or from

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[9]We are advised by the Secretary that he anticipates submitting "good cause" regulations in final form to Congress within as soon as two months, but in any event within the calendar year.

[10]J.S. App. F, pp. 48a-49a (letter of July 30, 1976, from Charles C. Gentile, Acting Regional Director, Office of Child Support Enforcement, Region I, to Vincent Capuano, Chief of Eligibility Services, Connecticut Department of Social Services); see also *id.* at 45a (memorandum of November 21, 1975, from HEW Acting Director, Office of Child Support Enforcement, to Elmer W. Smith, Acting Regional Director, Office of Child Support Enforcement).

Although the foregoing documents refer explicitly only to the IV-D agency's responsibilities, we are advised by the Secretary that HEW also takes the position that the IV-A agency should not declare an unwed mother ineligible for assistance for a failure to cooperate with state enforcement efforts unless that agency has first made a determination that there was no "good cause" for the failure.

[11]The State of Alaska, appearing as *amicus curiae*, states (Br. 4) that "HEW has advised Alaska and other states that they are not free to adopt their own 'good cause' standards pending promulgation of the mandated HEW standards." That statement is correct as far as it goes, but it does not go far enough. Under 42 U.S.C. (Supp. V) 602(a)(26) only the Secretary is authorized to establish "good cause" regulations of general applicability. In the interim, however, the states may follow the Secretary's advice and apply *ad hoc* "good cause" exceptions on a case by case basis.

enforcing Section 52-440b) until the Secretary's regulations are promulgated and approved.[12] There is language in the opinion supporting this view: the court said (J.S. App. A, p. 30a) that "[t]he defendants are required to comply with such regulations as the Secretary of HEW shall issue (including the right to a fair hearing) before continuing with the contempt proceedings against these plaintiffs."

Yet, the court directed (J.S. App. A, p. 30a n. 20) that appellant should "postpone any enforcement [of the recipient cooperation requirement] until the new regulations have been issued and approved" *only* if he finds that "he is unable to determine without the aid of specific regulations that his proposed enforcement action is not against the best interests of the child." This qualification indicates that the court correctly construed the statutory scheme to permit the states, at least in most situations, to make their own "good cause" determinations until the Secretary's regulations are in effect. If the district court intended to reach such a result, then in our view its judgment should be affirmed. If, on the other hand, appellant's reading of the opinion is correct, then the judgment should be reversed. Since, however, either interpretation of the court's opinion is as plausible as the other,[13] with the result that the decision is fatally ambiguous with regard to the central issue presented, we suggest that the Court should vacate the judgment of the district court and remand for clarification.

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[12]Appellees also appear to subscribe to this interpretation of the court's opinion. See Appellee Mothers' and Children's Motion to Dismiss or Affirm, pp. 5, 10, 15.

[13]For that reason it is impossible to determine whether, as the State of Alaska maintains (Br. 5-6), the decision conflicts with *Coe* v. *Califano*, No. 76-999, *supra*, holding that enforcement of the recipient cooperation and state enforcement aspects of the new legislation need not be postponed until the Secretary's regulations are in effect.

4. That course is especially appropriate in this case in light of the enactment by Connecticut of P.A. 76-334, February Session 1976.[14] Section 3 of that Act (Section 17-82b, Conn. Gen. Stat. Ann. (1976 Cum. Supp.), provides in pertinent part:

> All information required to be provided to the commissioner as a condition of such eligibility [for welfare assistance] under federal law shall be so provided by the supervising relative, provided, no person shall be determined to be ineligible if the supervising relative has good cause for the refusal to provide information concerning the absent parent or if the provision of such information would be against the best interests of the dependent child or children, or any of them. The commissioner of social services shall adopt by regulation * * * standards as to good cause and best interests of the child. Any person aggrieved by a decision of the commissioner as to the determination of good cause or the best interests of such child or children may request a fair hearing in accordance with the provisions of sections 17-2a and 17-2b.

The foregoing statute on its face does not indicate what effect, if any, it may be expected to have on the state's enforcement of Section 52-440b, and appellant does not mention the statute or explain its potential effect. In view of appellant's previous enforcement of Section 52-440b in tandem with the state's welfare program, however (see note 7, *supra*), it is at least likely that the new statute may have been intended by the Connecticut legislature to produce a

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[14]The district court's decision was rendered on June 1, 1976. P.A. 76-334 became effective June 2, 1976. The court's judgment was entered on June 17, 1976 (J.S. App. B). There is no indication that the district court was aware of P.A. 76-334.

result similar to that intended by the district court. In those circumstances the controversy would be moot: appellant would be unable to complain of a district court judgment that ordered him to do no more than his own legislature had commanded.

"This Court must review the District Court's judgment in light of presently existing Connecticut law, not the law in effect at the time that judgment was rendered." *Fusari* v. *Steinberg*, 419 U.S. 379, 387. Since P.A. 76-334 appears to bear directly on the issues involved, and since the Court "can only speculate how the new system might operate" (419 U.S. at 388-399), the Court should, as it did in *Fusari*, vacate the judgment of the district court and remand for reconsideration "in light of the intervening changes in Connecticut law" (*id.* at 390).[15]

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[15]On remand the district court also will be able to consider appellant's claim (J.S. 18-20)—which is also the subject of a motion that appellant states is now pending before that court (*id.* at 19)—that the district court's judgment was overbroad insofar as it enjoined appellant from enforcing Section 404.6 of his regulations (which, as noted, has now been amended) with respect to unwed mothers who are willing but unable to name the putative father of their illegitimate children.

CONCLUSION

The judgment of the district court should be vacated and the case remanded for clarification and for further consideration in light of P.A. 76-334.

Respectfully submitted.

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